TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~165~~ 94.

CHATTANOOGA FOUNDRY AND PIPE WORKS AND SOUTH PITTSBURG PIPE COMPANY, PLAINTIFFS IN ERROR,

vs.

CITY OF ATLANTA.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED AUGUST 3, 1905.

(19,867.)

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SUPREME COURT OF THE UNITED STATES.

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No. 365.

CHATTANOOGA FOUNDRY AND PIPE WORKS AND SOUTH PITTSBURG PIPE COMPANY, PLAINTIFFS IN ERROR,

vs.

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No. 1403.

United States Circuit Court of Appeals, Sixth Circuit.

CHATTANOOGA FOUNDRY AND PIPE WORKS AND SOUTH PITTSBURG PIPE COMPANY,

Plaintiffs in Error.

vs.

CITY OF ATLANTA,

Defendant in Error.

Error to the Circuit Court of the United States for the Eastern District of Tennessee.

RECORD.

ORIGINAL TRANSCRIPT FILED FEBRUARY 23, 1905.

TRANSCRIPT OF RECORD.

Term Caption, Oct. Term, 1904.

Be it remembered, that at a Circuit Court of the United States begun and held for the Southern Division of the Eastern District of Tennessee at the court rooms in the city of Chattanooga within said district and the Sixth Circuit on the first Monday it being the 3d day of October, A. D. 1904. Present and presiding the Hon. C. D. Clark, District Judge.

Among the proceedings had were the following, to-wit:

(Here follows "Summons" Filed Feby. 22nd. 1900.)

The President of the United States of America; to the Marshal of the Eastern District of Tennessee—Greeting:

You are hereby commanded to summon the Chattanooga Foundry & Pipe Works, a corporation created by and organized under the laws of Tennessee having its place of business in Hamilton County, Tennessee, and a and a citizen of said State, and the South Pittsburg Pipe Company, created by and organized under the laws of Tennessee, having its place of business in Marion County Tennessee, and a citizen of said State, if to be found in your district, to be and appear before the judges of the Circuit Court of the United States, in the Sixth Circuit, for the Southern Division of the Eastern District of Tennessee at the Federal Court rooms in Chattanooga, in said State, on the first Monday in April next, then and there to answer The City of Atlanta, a municipal corporation, created by and existing under the laws of the State of Georgia and being in Fulton County of said State, in an action to its damage fifty thousand dollars.

Herein fail not and have you then and there this writ.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Chattanooga, in the said District, the 6th day of Jan. in the year of our Lord 1900, and of our Independence, 124th.

(Seal)

Henry O. Ewing, Clerk.

State of Tennessee, Hamilton County:

The City of Atlanta as principal and A. C. Foust and J. L. Foust as sureties hereby acknowledge themselves bound unto the Chattanooga Foundry & Pipe Works and the South Pittsburg Pipe Company, the within named defendants, in the sum of two hundred and fifty dollars. But this obligation to be void, if said principal shall prosecute the within suit with effect, or shall pay such costs and damages as may be awarded against said principal, the within named plaintiff, by the court having cognizance thereof.

This Jan. 6th. 1900.

The City of Atlanta.
By C. P. Goree, Atty.
A. C. Foust, Surety.
J. L. Foust, Surety.

Chattanooga, Tenn., Jan 17th, 1900.

I hereby acknowledge service of the summons.

D. Giles.

Received at Chattanooga, Jan. 17th, 1900. Executed on D. Giles, President of the Chattanooga Foundry & Pipe Works, at Chattanooga, Jan. 17th, 1900.

C. W. McCall, Dept. Marshal.

Chattanooga, Tenn., Feb. 16th, 1900.

I hereby acknowledge the service of the within summons.

J. R. Rice.

Executed on J. R. Rice at Chattanooga, Feb. 16th, 1900, he being highest officer of the South Pittsburg Pipe Co. to be found in my district.

C. W. McCall, Dept. Marshal.

This summons was issued on the 6th day of Jan., 1900.

Henry O. Ewing, Clerk.

(Here follows "Declaration, Filed April 2, 1900.)

In the United States Circuit Court for the So[illegible] Division of the Eastern District of Tennessee.

The City of Atlanta, a municipal corporation created and chartered by and existing under the laws of the State of Georgia, located in Fulton County in the State of Geor-

gia, and a citizen of the State of Georgia, plaintiff, by its attorneys, Westmoreland Brothers, L. A. Dean and C. P. Goree, complains of the Chattanooga Foundry and Pipe Works, a corporation created by and organized and existing under and by virtue of the laws of the State of Tennessee, and having its principal place of business in the County of Hamilton, in the said State of Tennessee; and of the South Pittsburg Pipe Company, a corporation created by and organized and existing under and by virtue of the laws of the State of Tennessee, and having its principal place of business in the County of Marion, in said State of Tennessee; said Chattanooga Foundry & Pipe Works and South Pittsburg Pipe Company, defendants, both being citizens of the State of Tennessee, who have been summoned to answer the said plaintiff in an action to its damage in the sum of fifty thousand dollars ($50,000.00), for that,

Whereas, on the date hereinafter mentioned the said defendants, who were engaged in the business of manufacturing and selling cast iron pipe and fittings, did, on or about the 28th day of December, 1894, in the City of Chattanooga, in the State of Tennessee, by their duly appointed and qualified officers, agents and representatives, enter into a contract or combination together with the following corporations, to-wit: The Anniston Pipe & Foundry Company, and the Howard-Harrison Iron Company, both citizens of the State of Alabama, and corporations created by and organized under the laws of the State of Alabama, the former having its principal place of business at Anniston, Alabama, and the latter having its principal place of business at Bessemer, Alabama, Dennis, Long & Co., a corporation created by and organized under the laws of the State of Kentucky, and a citizen of said State, having its principal place of business in Louisville, Kentucky, and the Addyston Pipe & Steel Company, a corporation organized under the laws of the State of Ohio, and a citizen of said State, having its principal place of business at Cincinnati, Ohio, said corporations being likewise engaged in the business of manufacturing and selling cast iron pipe and fittings, in the form of a trust, or conspiracy, in restraint of trade or commerce in and between the several States and Territories, to-wit: Alabama, Arizona, California, Colorado, N. Dakota, S. Dakota, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Indian Territory, North Carolina, South Carolina, New Mexico, Minnesota, Mich-

igan, Tennessee, Texas, Illinois, Wyoming, Indiana, Ohio, Utah, Washington, Oregon, Iowa, West Virginia, Nevada, Oklahoma, and Wisconsin; in relation to the manufacture and sale of cast iron pipe and fittings, which said confederacy and unlawful conspiracy was entered into, as aforesaid in violation the law and in defiance of the same, and was formed by the defendants and their associates for the purpose of defrauding their customers in the purchase and use of the pipe and fittings manufactured by them; the defendants and their said associates carrying on their said unlawful confederacy and conspiracy under the name and style of the "Associated Pipe Works," the same being composed of the defendants and their said associates, and that by reason of said unlawful combination and conspiracy, as aforesaid, the defendants and their associates intended and proposed to destroy, and did destroy competition among themselves as to any work done and pipe and fittings furnished consumers in any of the States and Territories above mentioned, and to make effectual this purpose it was agreed by defendants, and their associates that upon all work done in said States and Territories a "bonus" should be charged on every ton of pipe and every pound of fittings sold by them, or either of them to be determined by the amount the combination could force the customer to pay, and that by reason of said trust and unlawful combination the said Anniston Pipe & Foundry Company, from the 5th day of April, 1895 to the 30th day of January 1897, sold and shipped large quantities of cast iron pipe and fittings to the plaintiff at Atlanta, Georgia, as fully shown, set out and itemized in "Exhibits A, B, and C" hereto attached and made a part hereof, and that between April 5th 1895, and October 22nd 1895, both inclusive the said Anniston Pipe & Foundry Company sold and furnished to the plaintiff cast iron pipe and fittings costing in the aggregate, eight thousand, three hundred and eighty-six dollars and seventy-eight cents at twenty-one dollars and twenty-two dollars and fifty cents per ton for cast iron pipe, and two and one-eight, two and one half and two and three-fourths cents per pound for fittings or special as fully shown, set out and itemized in "Exhibit A" both free on board cars at Atlanta, Georgia, said pipe being worth at said date only seventeen dollars and twenty-five cents per ton, and said fittings being worth only two cents per pound, both free on board the cars at Atlanta, Georgia, and that from November 12th, 1895, to December 30th, 1895, both inclusive the said Anniston Pipe

and Foundry Company furnished and sold to plaintiff cast iron pipe and fittings, costing in the aggregate thirty-six thousand seven hundred and seventy-nine dollars and seventy-eight cents, at twenty-two dollars per ton for cast iron pipe, and two and one-half and three cents per pound for fittings or specials, as fully shown, set out and itemized in "Exhibit B," both free on board the cars at Atlanta, Georgia, said pipe being worth at said dates only seventeen dollars and twenty-five cents per ton, and said fittings being worth only two cents per pound, both free on board the cars at Atlanta, Ga., and that said Anniston Pipe and Foundry Company, from January the 9th, 1896, to January 30th, 1897, sold and furnished to plaintiff cast iron pipe and fittings costing in the aggregate, eleven thousand five hundred and sixty-nine dollars and thirty-six cents, at twenty-one dollars, twenty-two dollars and twenty-two and seventy-five cents per ton for cast iron pipe, two and one-fourth and two and one-half cents per pound for fittings or specials, as fully shown, set out and itemized in exhibit "C," both free on board the cars at Atlanta, Ga., said pipe being worth on said date only seventeen dollars and twenty-five cents per ton, and said fittings being worth only two cents per pound, both free on board the cars at Atlanta, Ga., and said defendants and their associates, did, unlawfully, for the purpose of carrying out said unlawful combination, make and offer fraudulent bids, which were well understood among themselves, and not known to plaintiff; the said Anniston Pipe and Foundry Company in each instance putting in the lowest bid for the contracts of furnishing said pipe and fittings, and the defendants and their other associates making and offering in each instance bids always higher and larger than those offered by the Anniston Pipe and Foundry Company, and the defendants and their associates did participate with the said Anniston Pipe and Foundry Company in the "bonus" made by said fraudulent sale, made as aforesaid, and said defendants, and their said associates, by reason of said fraudulent combination, and said fraudulent sales to plaintiff, as aforesaid, did defraud the plaintiff out of the sum of fifteen thousand dollars in violation of the Act of Congress, of July the 2nd, 1890, which, together with the true worth of said pipe and fittings, as aforesaid, paid to the said Anniston Pipe and Foundry Company by the plaintiff aggregating the sum of fifty-six thousand, seven hundred and thirty-six dollars and twelve cents, as fully shown, set out and itemized in said Exhibits "A. B. & C."

And plaintiff was injured in its property by the defendants and their said confederates by reason of the unlawful acts and deeds aforesaid, forbidden by the Act of Congress of the United States of July 2nd, 1890, entitled "An act to protect commerce against unlawful restraints and monopolies" Chapter 647, supplement to the Revised Statutes of the United States, Vol. 1, Sec. edition, 1874-1891, in the sum fifteen thousand dollars.

Wherefore plaintiff sues the defendants for the sum of forty-five thousand dollars, being three fold the damages by it sustained by reason of said unlawful conduct as aforesaid as provided by the Act of Congress of the United States of July 2nd, 1890, and for five thousand dollars as a reasonable attorney's fee.

The plaintiff demands a jury to try this cause.

Westmoreland Bros.
L. A. Dean,
C. P. Goree,
J. L. Foust.
Attys. for Plaintiff.

"Exhibit A."

Atlanta Ga., Dec. 19th, 1899.

Account of Pipe and Fittings purchased by Atlanta Water Works from Anniston Pipe and Foundry Company, 1895 and1896.

1895.				
Apr.	5.	69,270 lbs. 6-in. pipe at $21.00 per ton	$1,441.34	
		550 lbs. fittings at 2 1-8c per lb.	11.68	
			$1,453.02	
		Less freight	173.97	$1,279.05
	30.	15,038 lbs. 6-in. pipe at $21.00 per ton	$315.40	
		Less freight	39.05	276.05
May	7.	2,230 lbs. fittings at 2 1-8c per lb.	$ 47.39	
	8.	2,040 lbs. fittings at 2 1-8c per lbs.	43.35	
	10.	2,630 lbs. fittings at 2 1-8c per lb.	55.88	
	11.	1,956 lbs. fittings at 2 1-8c per lb.	41.57	
	14.	9,008 lbs. fittings at 2 1-8c per lb.	191.42	
	16.	1,226 lbs. fittings at 2 1-8c per lb.	26.05	
	20.	29,908 lbs. 6-in. pipe at $21.00 per ton	314.03	
	22.	630 lbs. fittings at 2 1-8c per lb.	13.39	
	28.	1,208 lbs. fittings at 2 1-8c per lb.	25.67	
	30.	698 lbs. fittings at 2 1-8c per lb.	14.83	
			$773.58	
		Less freight	66.98	706.60

June	3.	35,874 lbs. 6-in. pipe at $21.00 per ton	$376.68	
		34,736 lbs. 6-in. pipe at $21.00 per ton	364.73	
		4,138 lbs. fittings at 2 1-8c per lb.	87.93	
	4.	35,980 lbs. 6-in. pipe at $21.00 per ton	377.79	
	7.	5,092 lbs. fittings at 2 1-8c per lb.	108.21	
	21.	516 lbs. fittings at 2 1-8c per lb.	10.97	
	25.	59,558 lbs. 6-in. pipe at $21.00 per ton	625.36	
	26.	41,332 lbs. 6-in. pipe at $21.00 per ton	434.00	
			2,385.67	
		Less freight	271.41	2,114.26
July	10.	25,638 lbs 6-in. pipe at $21.00 per ton	$269.20	
		Less freight	32.68	236.52
Aug.	15.	854 lbs. fittings at 2 3-4c per lb.	$ 23.49	
	28.	1,180 lbs. fittings at 2 1-2c per lb.	29.50	
Sept.	3.	143,290 lbs. 6-in. pipe at $22.50 per ton	1,612.03	
	4.	56,892 lbs. 6-in. pipe at $22.50 per ton	640.04	
	13.	155,508 lbs. 6-in. pipe at $22.50 per ton	1,749.46	
	25.	906 lbs. fittings at 2 1-2c per lbs.	22.65	
	28.	1,446 lbs. fittings at 2 1-2c per lb.	36.15	
			$4,113.32	3,645.22
		Less freight	468.10	

Oct.	1..	366 lbs. fittings at 2 1-2c per lb.	$ 9.15	
	3.	360 lbs. fittings at 2 1-2c per	9.00	
	5.	1,466 lbs. fittings at 2 1-2c per lb.	36.65	
	10.	542 lbs. fittings at 2 1-2c per lb.	13.55	
	19.	1,458 lbs. fittings at 2 1-2c per lb.	36.45	
	22.	1,254 lbs. fittings at 2 1-2c per lb.	31.35	
			$136.15	
		Less freight	7.07	129.08
				$8,386.78

"Exhibit B."

1895.				
Nov.	12.	97,994 lbs. 30-in. pipe at $22.00 per ton		$1,077.93
	13.	66,170 lbs. 30-in. pipe at $22.00 per ton		716.87
	16.	66,806 lbs. 30-in. pipe at $22.00 per ton		718.37
	15.	32,798 lbs. 30-in. pipe at $22.00 per ton		360.78
		2,622 lbs. fittings at 2 1-2c per lb.		65.55
	18.	80,036 lbs. 30-in. pipe at $22.00 per ton		1,078.40
	19.	101,036 lbs. 30-in. pipe at $22.00 per ton		1,089.39
		3,396 lbs. fittings at 2 1-2c per lb.		84.90
	20.	100,537 lbs. 30-in. pipe at $22.00 per ton		1,083.91
		3,369 lbs. fittings at 2 1-2c per lb.		84.20
	21.	28,658 lbs. 30-in. pipe at $22.00 per ton		315.24

		2,797 lbs. fittings at 2 1-2c per lb.	69.93
	22.	108,060 lbs. 30-in. pipe at $22.00 per ton	1,386.66
	23.	208,506 lbs. 30-in. pipe at $22.00 per ton	2,293.56
		2,643 lbs. fittings at 2 1-2c per lb.	66.08
	25.	65,076 lbs. 30-in. pipe at $22.00 per ton	715.84
	26.	166,240 lbs. 30-in. pipe at $22.00 per ton	1,872.63
		2,621 lbs. fittings at 2 1-2c per lb.	65.52
	27.	113,056 lbs. 30-in. pipe at $22.00 per ton	1,243.61
	29.	28,458 lbs. 30-in. pipe at $22.00 per ton	313.04
	30.	254,754 lbs. 30-in. pipe at $22.00 per ton	2,802.30
		2,610 lbs. fittings at 2 1-2c per lb.	65.25
		2,258 lbs. fittings at 2 1-2c per lb.	64.62
Dec.	2.	86,816 lbs. 30-in. pipe at $22.00 per ton	932.97
	3.	86,322 lbs. 30-in. pipe at $22.00 per ton	927.54
	4.	106,026 lbs. 30-in. pipe at $22.00 per ton	1,254.28
		2,590 lbs. fittings at 2 1-2c per lb.	64.75
	5.	168,524 lbs. 30-in. pipe at $22.00 per ton	1,853.76
	6.	86,070 lbs. 30-in, pipe at $22.00 per ton	924.77
		5,075 lbs. fittings at 2 1-2c per lb.	126.88
	10.	20,309 lbs. 6-in. pipe at $22.00 per ton	223.40
		1,470 lbs. 10-in. pipe at $22.00 per ton	16.17
	12.	56,302 lbs. 30-in. pipe at $22.00 per ton	619.33
		2,582 lbs. fittings at 2 1-2c per lb.	64.55
	11.	28,282 lbs. 30-in. pipe at $22.00 per ton	311.10

	5,212	lbs. fittings at 2 1-2c per lb.	130.30
13.	141,317	lbs. 30-in. pipe at $22.00 per ton	1,554.49
14.	84,510	lbs. 30-in. pipe at $22.00 per ton	929.61
17.	281,436	lbs. 30-in. pipe at $22.00 per ton	3,095.79
	2,630	lbs. fittings at 2 1-2c per lb.	65.75
19.	336,413	lbs. 30-in. pipe at $22.00 per ton	3,700.54
23.	84,012	lbs. 30-in. pipe at $22.00 per ton	924.24
	5,326	lbs. fittings at 2 1-2c per lb.	133.15
	2,686	lbs. fittings at 3c per lb.	80.58
27.	28,458	lbs. 30-in. pipe at $22.00 per ton	313.04
30.	33,724	lbs. 10-in. pipe at $22.00 per ton	370.96
	2,536	lbs. fittings at 2 1-2c per lb.	63.40
	10,722	lbs. 30-in. pipe at $22.00 per ton	117.94
	3,206	lbs. fittings at 2 1-2c per lb.	75.65
	5,888	lbs. fittings at 2 1-2c per lb.	117.76
	5,090	lbs. fittings at 3c per lb.	152.70
		Freight prepaid	$36,779.98

"Exhibit C."

1896.				
Jan.	9.	7,486 lbs. fittings at 2 1-2c per lb.		$187.15
			Freight paid.	
Mch.	5.	2,645 lbs. fittings at 2 1-2c per lb.	$66.13	

	Less freight		2.13	64.00
17.	2,938 lbs. fittings at 2 1-2c per lb.		73.45	73.45
13.	5,350 lbs. 30-in. pipe, flanged, at 2c per lb.			107.00
	64 lbs. bolts at 2 1-2c per lb.			1.60
30.	1,392 lbs. 10-in. pipe at $22.75 per ton		15.83	
	4,480 lbs. fittings at 2 1-2c per lb.		100.80	
			116.63	
	Less freight		4.70	111.93
Apr. 1, 2.	1,834 lbs. fittings at 2 1-2c per lb.		41.37	41.37
10.	77,084 lbs. 20-in. pipe at $22.00 per ton		825.93	
	3,548 lbs. fittings at 2 1-4c per lb.		79.83	
			905.76	
	Less freight		62.90	842.86
13.	76,170 lbs. 20-in. pipe at $22.00 per ton		837.87	
	2,604 lbs. fittings, at 2 1-4c per lb.		58.59	
			896.46	
	Less freight	62.02		
	Less 3 pcs. cracked	15.00	78.02	818.44

16.	37,060 lbs. 20-in. pipe at $22.00 per ton	429.66	
	Less freight	31.25	398.41
20.	39,044 lbs. 20-in. pipe at $22.00 per ton	429.48	
	1,364 lbs. fittings at 2 1-4c per lb.	30.69	
		460.17	
	Less freight	32.32	427.85
22.	37,898 lbs. 20-in. pipe at $22.00per ton	416.88	
	Less freight	30.31	386.57
21.	26,862 lbs. 12-in. pipe at $22.75 per ton	305.56	
	3,464 lbs. fittings at 2 1-4c per lb.	77.94	
		383.50	
	Less freight	24.22	359.28
24.	30,988 lbs. 20-in. pipe at $22.00 per ton		340.87
27.	40,502 lbs. 12-in. pipe at $22.75 per ton		460.69
	1,926 lbs. fittings at 2 1-4c per lb.		43.33
29.	40,254 lbs. 12-in. pipe at $22.75 per ton	457.89	
	1,986 lbs. fittings at 2 1-4c per lb.	44.69	502.58
May 12.	12,880 lbs. 12-in. pipe at $22.75 per ton	146.51	

		5,122 lbs. fittings at 2 1-4c per lb.	115.25	261.76
	20.	52,640 lbs. 6-in pipe at $22.75 per ton		598.79
June	9.	42,070 lbs. 6-in. pipe at $22.75 per ton		478.55
	11.	40,344 lbs. 6-in. pipe at 22.75 per ton		458.91
	13.	40,868 lbs. 6-in. pipe at 22.75 per ton		464.87
	16.	26,964 lbs. 6-in. pipe at 22.75 per ton		306.72
	24.	230 lbs. fittings at 2 1-4c per lb.		5.18
July	1.	984 lbs. fittings at 2 1-4c per lb.	$22.14	
		Less freight	.79	21.35
	21.	3,240 lbs. fittings at 2 1-4c per lb.		72.90
	30.	3,370 lbs. fittings at 2 1-4c per lb.		75.83
Aug.	4.	804 lbs. fittings at 2 1-4c per lb.		18.09
	17.	132 lbs. fittings at 2 1-4c per lb.	$2.97	
		Less freight	.11	2.86
Sept.	24.	1,910 lbs. fittings at 2 1-4c per lb.		42.98
Oct.	10.	37,548 lbs. 6-in. pipe at $22.75 per ton		427.11
	13.	37,234 lbs. 6-in. pipe at 22.75 per ton		423.54
	15.	112 lbs. fittings at 2 1-4c per lb.		2.52
	29.	16,144 lbs. 30-in. pipe at $22.75 per ton	$183.64	
		3,042 lbs. fittings at 2 1-4c per lb.	68.45	252.09

1897.				
Jan.	5.	18,704 lbs. 6-in. pipe at $22.75 per ton	$212.76	
		240 lbs. fittings at 2 1-4c per lb.	5.40	218.16
	2.	240 lbs. fittings at 2 1-4c per lb.		5.40
	8.	538 lbs. fittings at 2 1-4c per lb.	12.11	
		Less freight	.43	11.68
	18.	1,850 lbs. fittings at 2 1-4c per lb.	$41.63	
		Less freight	1.48	40.15
	21.	39,328 lbs. 6-in. pipe at $21.00 per ton		412.94
	22.	75,940 lbs. 6-in. pipe at 21.00per ton	$797.37	
		1,108 lbs. fittings at 2 1-4c per lb.	24.93	
				822.30
	23.	20,582 lbs. 6-in. pipe at $21.00 per ton		215.54
	28.	33,254 lbs. 6-in. pipe at 21.00 per ton		349.17
	30.	39,305 lbs. 16-in. pipe at 21.00 per ton		412.70
				$11,569.36

(Here follows "Pleas Filed April 4th, 1900.)

In the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee.

City of Atlanta,

vs.

Chattanooga Foundry & Pipe Co. and South Pittsburg Pipe Co.

Pleas

I.

The defendant for plea says it is not guilty of the matters in the plaintiff's declaration alleged.

II.

The defendant for plea says that Plaintiff's action accrued more than one year before suit brought.

III.

The defendant for plea says that plaintiff's action accrued more than three years before suit brought.

Brown & Spurlock,
Attys. for Defts.

The defendant by order of court this day entered is allowed to file the above pleas to the declaration as amended to date, and hereby refile said pleas.

Brown & Spurlock,
Attys. for Defts.

Here follows "Demurrer to Pleas" Filed Apr. 6, 1900.)

In the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee:

Demurrer to Pleas.

City of Atlanta,

vs.

Chattanooga Foundry & Pipe Co. and South Pittsburg Pipe Co.

And now comes the plaintiff and demurs to the defendants second and third pleas of the statute of limitations of one years and of three years, respectfully for the following reasons:

I.

Said pleas offer no valid and legal defense to plaintiff's suit.

II.

The statute of limitations of one year, pleaded in said second plea, does not apply to or operate against plaintiff's suit.

III.

The statute of limitations of three years, pleaded in said third plea does not apply to or operate against plaintiff's action.

Wherefore plaintiff demurs and prays judgment etc.

Westmoreland Bros.
L. A. Dean.
C. P. Goree.
J. L. Foust.
Attys. for Plaintiff.

Monday, April 2nd, 1900. Term Caption.

Be it remembered that at a Circuit Court of the United States begun and held for the Southern Division of the Eastern District of Tennessee, at Chattanooga, within said District and the Sixth Circuit on the first Monday it being the 2nd day of April, A. D. 1900.

Present and presiding the Hon. C. D. Clark, District Judge for the Eastern & Middle Districts of Tennessee.

Among the proceedings had were the following to-wit:

Tuesday, June 5th, 1900. Court met pursuant to adjournment.

Present and presiding the Hon. C. D. Clark, Judge of the United States District Court for the Eastern & Middle Districts of Tennessee.

(Here follows "Order overruling Demurrer to 3rd Plea, filed June 5th, 1900.)

City of Atlanta,

vs.

Chattanooga Foundry & Pipe Works, et al.

This cause was this day heard on plaintiff's demurrer to the second and third pleas of defendants and the court after argument of counsel being of opinion that the demurrer to the second plea is well taken, sustains the same, and strikes out said second plea, and the court being of opinion that the demurrer to the third plea is not well taken, overrules the same; the plaintiffs excepted to the action of the court in overruling the demurrer to the third pleas and were allowed ten days in which to make further defense thereto.

(Here follows "Amended Declaration" filed June 5th, 1900.)

In the United States Circuit Court at Chattanooga, Tenn.

City of Atlanta,

vs.

Chattanooga Foundry & Pipe Works, and South Pittsburg Pipe Company

No.

And now comes the plaintiff by its attorneys, and by leave of the court, amends its declaration filed herein as follows, to-wit:

1. By striking out the word "June" in the 14th line of page three thereof and inserting in its place the word "January."

2. And by inserting on the 4th page thereof, immediately preceding the word "wherefore," the following averment:

"And plaintiff was injured in its property by the defendants and their said confederates, by reason of the unlawful acts and deeds aforesaid forbidden by the act of Congress of the United States, of July 2, 1890, entitled "An Act to protect commerce against unlawful restraints

and monopolies," "Chapter 647, Supplement to the Revised Statutes of the United States, Vol. 1, Second Edition, 1874-1891, in the sum of fifteen thousand dollars."

3. And by striking from the last paragraph of said Declaration on page four thereof, the following words being three times the amount of which they were defrauded by the said defendants and their said associates, the penalty," and by inserting in lieu thereof the following words: "being three-fold the damages by it sustained by reason of said unlawful conduct as aforesaid."

O. K. B. & S.

Clerk file this and the plaintiff will make changes in declaration thereof.

Clark, Judge.

(Here follows "Replication to Pleas," Filed June 13th, 1900.)

In the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee.

City of Atlanta,

vs.

Chattanooga Foundry & Pipe Works, and South Pittsburg Pipe Company

Replication to Plea.

And now comes the plaintiff by its attorneys and joins issue on the first plea filed by the defendants herein.

II.

And now comes the plaintiff by its attorneys and for replication to the third plea of the defendants filed herein, says:

1. That the plaintiff's said right of action did not accrue more than three years before suit brought, and this the plaintiff prays may be inquired of by the country. Issue joined.

Brown & Spurlock, Attys.

2. That the defendants fraudulently concealed the fact that it had made and entered into the fraudulent contract, combination and conspiracy in the declaration mentioned, and the plaintiff purchased and paid for the cast iron pipe, fittings and specials, and paid the "bonuses" and the un-

lawful and fraudulent profits charged thereon as a part of the price of the cast iron pipe, fitting and specials according to the representations and statements of the defendant and their confederates in that behalf made, and in ignorance of the fact that said unlawful bonuses and profits were charged as part of the price of said materials, and the said defendants and their said confederates denied the existence of said unlawful contract, combinations, trust and conspiracy in the declaration mentioned, and actively concealed the evidence thereof, and although the plaintiff used due diligence, it was unable to discover the unlawful contract, combination trust and conspiracy, until the decision rendered by the United States Circuit Court of Appeals at Cincinnati, Ohio, in the case of the United States, vs. The Addyston Pipe and Steel Company, on the 8th day of Feb. 1898, and did within less than three years thereafter institute this suit, and this the plaintiff is ready to verify.

3. That all the pipe, fittings and specials embraced in exhibit "C" annexed to and made a part if its declaration filed herein, aggregating many thousand pounds, were furnished and delivered to the plaintiff by the Anniston Pipe and Foundry Company, the alleged confederate of the defendants, at the dates as shown in said exhibit "C," the first delivery being made on Jan. 9th, 1896 and the last one being made on the 30th day of Jan. 1897, for which the plaintiff paid the said Anniston Pipe and Foundry Company divers sums of money at divers times, aggregating in amount the sum of $11,569.36; the first payment as aforesaid being made on the 12th day of Feb. 1896, and the last one being made on the 12th day of Feb, 1897, and that said pipe and fitting and specials were furnished by said Anniston Pipe and Foundry Company as aforesaid, and paid for by the plaintiff as aforesaid, under a contract duly made by and between said parties prior to the 9th day of Jan. 1896, and said contract was not complete until all the pipe fittings and specials were delivered as aforesaid and the money paid therefor; and that the statute of limitations did not begin to run against plaintiff's cause of action, pertaining to its right to recover damages for injuries growing out of this contract until after the 30th day of Jan. 1897.

Westmoreland Bros,
L. A. Dean,
C. P. Goree,
J. L. Foust,
Attys. for Plft.

(Here follows "Demurrer" filed Sept. 11th. 1900.)

City of Atlanta,

vs.

Chattanooga Foundry & Pipe Works,
South Pittsburg Pipe Works.

Defendants come and demur to the plaintiff's replications to the third plea of the defendants filed herein.

Defendants demur to the second replication to said third plea:

1. Because the said matter thereof is only applicable where the cause of action arises from fraud.

2. Because it is not applicable to actions at law.

3. Because the statute of limitations of the State of Tennessee set up in defendants' plea, contain no exception in favor of plaintiffs or parties from whom the cause of action has been concealed.

4. Because it is not alleged that defendants fraudulently concealed from plaintiffs their cause of action.

5. Because no facts are alleged showing that defendants fraudulently concealed from plaintiffs their cause of action.

6. Because plaintiffs failed to set out any fact showing that they exercised any diligence to find out or discover their right of action, or to discover the existence of the unlawful combination alleged, nor do plaintiffs show when and how the discovery was made, and why it was not sooner made.

II.

Defendants demur to the third replication to defendfendants' third plea.

1. Because plaintiffs may show under the first replication to defendants' third plea and issue joined thereon, the same facts as set out in the third replication to the defendant's third plea.

2. Because there can be but one replication to a plea without leave of the court first had and obtained.

3. Because plaintiff's right of action against defendants accrued at the time the contract of sale was made of the material, etc., in pursuance of said unlawful combination, and not when the last shipment was finally paid for.

4. Because defendants are not alleged to have received any part of the payments made for the pipe and

other materials sold and it is not alleged that the payments made were in furtherance of the wrongful combination alleged, and the wrong done plaintiffs, was when the sale was made, and not afterwards.

Brown & Spurlock, Attys.

State of Tennessee, County of Hamilton.

Foster V. Brown makes oath that he is one of the attorneys of the defendant, and said demurrer is not interposed for delay.

Foster V. Brown.

Sworn to and subscribed before me this 11th day of Sept. 1900.

R. M. Watkins, D. C.

We certify that in our opinion the foregoing demurrer is well founded in point of law.

Foster V. Brown.

(Here follows "Amendment to second Replication," Filed March 27, 1901.)

To the United States Circuit Court for the Southern Division of the Eastern District of Tennessee.

City of Atlanta,

vs.

Chattanooga Foundry & Pipe Works, et al.

And now comes the plaintiff by attorney, by leave of court first had and obtained, amends the second replication by it filed to the defendants third plea and says that heretofore to-wit, on the day of December, 1894, the defendants, the Chattanooga Foundry & Pipe Works and the South Pittsburg Pipe Company, formed and entered into an unlawful and secret combination, trust and conspiracy with the certain other firms and corporations in the declaration mentioned, who were engaged in the same business in which the plaintiffs were engaged, to-wit, the manufacture and sale of cast iron pipe fittings and specials as stated in the declaration; and plaintiff says that said combination, trust and conspiracy was in its nature

secret and clandestine and was conceived and executed in such a manner and upon such a plan as to secure continued secrecy, and that said defendants and their associates actively and fraudulently concealed the fact that they had made and entered into the fraudulent combination, trust and conspiracy in the declaration mentioned and that the plaintiff purchase and paid for the cast iron pipe, fittings and specials in the declaration mentioned and paid the said bonuses and unlawful and fraudulent profits charged thereon as a part of the price of the said cast iron pipe, fittings and specials in reliance upon the representation of the defendants and their confederates in that behalf made that the price of the said cast iron pipe, fittings and specials was fixed, regulated and controlled by the price of iron, the cost of manufacture and the freight rates to the points of delivery, and the plaintiffs were then, and for a long time thereafter remained, in ignorance of the fact that the said unlawful bonuses and profits were secretly, clandestinely and fraudulently charged as part of the price of said pipe, fittings and specials in pursuance of the secret and clandestine combination, trust and conspiracy hereinbefore mentioned; and the plaintiff says that afterwards, to-wit, in the year 1896, the plaintiff was led to suspect that such an unlawful combination, trust and conspiracy had been entered into by the defendants and their said confederates and existed, and, for the purpose of investigating the facts as to the existence of such combination, trust and conspiracy, a committee was appointed by the plaintiff to diligently inquire into the matter, but the defendants and their associates so carefully concealed the proof and evidences of the existence of such combination, trust and conspiracy that its existence was not discovered and could not be discovered by the exercise of due care and diligence; and the plaintiff says that the defendants and their confederates, to-wit, the officers and representatives of the Anniston Pipe and Foundry Company, appeared before the said Committee appointed to examine into the facts as to whether or not a combination trust or conspiracy existed, and denied that any such trust, combination or conspiracy existed, and asserted and claimed that the prices charged for iron pipe, fittings and specials were fair and reasonable and based upon honest competition only, and were not controlled or regulated by any combination, trust or conspiracy; and plaintiff says that at another time, to-wit, on or about the 25th day of January, 1897, after said un-

lawful combination, trust and conspiracy had been entered into as stated in the declaration, one of the officers of the defendant, Chattanooga Foundry & Pipe Company made oath that his said company had not entered into any contract or agreement for the purpose of wrongfully and fraudulently procuring unreasonable and extortionate prices for pipe, and at the same date the same officer made oath that the said defendant company was compelled to accept such prices for pipe as were, from time to time fixed by its competitors in the territory in which his said company might be operating at that time, and that the said defendant company had no voice or influence in fixing the prices of pipe, but must take work either at the prices fixed by competition or suspend operation until the demand for pipe should guarantee a full supply of contracts to all engaged in a similar business with the defendant company; and the plaintiff says that these several statements so made by the defendants, their officers and confederates were false and fraudulent, and were known to be false and fraudulent when made, and were made for the purpose of actively and effectually concealing the existence of said unlawful combination, trust and conspiracy, and in furtherance thereof and of its secret character, and by means of these and similar and other false statements and affidavits, the said defendants and their confederates concealed and covered up the proofs and evidences of the existence of said unlawful combination, trust and conspiracy, and mislead and deceived the plaintiff to such an extent that it was unable to discover that such unlawful trust and conspiracy existed until the 8th day of February, 1898, when the Supreme Court of the United States so decided in the case of the United States vs. The Addyston Pipe and Steel Company, et al., and the plaintiff alleges that on the day and year aforesaid and within less than three years next before the bringing of this suit, the plaintiff, notwithstanding the fraudulent suppression and concealment of the facts, on the part of the defendants and the other parties to said illegal and fraudulent contract, combination trust and conspiracy in the declaration alleged, did discover the facts aforesaid, and did within less than three years after such discovery institute this present suit, and this the plaintiff is ready to verify.

Westmoreland Bros.
L. A. Dean,
C. P. Goree,
J. L. Foust,
Attys. for Plaintiff.

April 1st, 1901. Term Caption.

Be it remembered, that a Circuit Court of the United States begun and held for the Southern Division of the Eastern District of Tennessee, at the court rooms in the city of Chattanooga within said district and the Sixth Circuit on the first Monday, it being the 1st day of April, A. D. 1901.

Friday, August 16th, 1901.

Court met pursuant to adjournment.

Present and presiding, the Hon. C. D. Clark, Judge of the United States District Court for the Eastern and Middle Districts of Tennessee.

(Here follows "Order Allowing Defendants to Withdraw Pleas," etc.)

City of Atlanta

vs.

Chattanooga Foundry & Pipe Works, et al.

On application of defendants, and for good reasons appearing, the defendants are allowed to withdraw their pleas heretofore filed in this case, and are allowed to file a demurrer to plaintiff's declaration, which is done.

Thereupon the demurrer coming on to be heard by the court, and the court being of opinion that said demurrer is not well taken, the same is overruled, to which action of the court defendants except.

O. K.

J. L. Foust,
Atty. for Complt.

(Here follows "Pleas," filed Aug. 16th, 1901.)

In the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee.

City of Atlanta

vs.

Chattanooga Foundry & Pipe Works, et al.

1.

The defendants for plea say that they are not guilty of the matters in the plaintiff's declaration alleged.

2.

The defendants for further plea say that they did not undertake and contract as the plaintiff in its declaration alleges.

3.

Defendants for further plea say that plaintiff's action accrued more than one year before the suit brought.

4.

Defendants for further plea say that plaintiff's action accrued more than three years before the suit brought.

Brown & Spurlock, Attys.

(Here follows "Demurrer," filed Aug. 16th, 1901.)

City of Atlanta

vs.

Chattanooga Foundry & Pipe Wks. and South Pittsburg Pipe Wks.

Defendants come and demur to the plaintiff's declaration, and assign the following:

(1)

Because the facts alleged in plaintiff's declaration do not entitle them to recover the damages claimed, under the Act of Congress passed July 2nd, 1900, entitled "An act to protect trade and commerce against unlawful restraint and monopolies."

(2)

Because the facts alleged are insufficient to entitle plaintiff to recover in this action.

(3)

Because it is not alleged that plaintiffs were engaged in interstate commerce or trade at the time of the wrongs complained of.

(4)

Because the wrongs and injuries suffered by plaintiff are not the direct and immediate effect of the unlawful combination or restraint of trade complained of.

(5)

Because it does not appear from the facts alleged that plaintiff has suffered any damage in its business or property by reason of the contract or combination entered into between defendant and other pipe companies named in the declaration.

Brown & Spurlock, Attys.

State of Tennessee, County of Hamilton:

Foster V. Brown makes oath that he is one of the attorneys of defendant, and said demurrer is not interposed for delay.

Foster V. Brown.

Sworn to and subscribed before me, this 30th day of March, 1901.

R. M. Watkins, D. C.

We certify that in our opinion the foregoing demurrer is well founded in point of law.

Brown & Spurlock.

(Here follows "Demurrer to Pleas," filed Sept. 26th, 1901.)

In the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee.

City of Atlanta

vs.

Chattanooga Foundry & Pipe Company and South Pittsburg Pipe Company.

} No. 647.

Demurrer to Pleas.

And now comes the plaintiff and demurs to the defendants' third and fourth pleas of the statute of limitations of one year and of three years, respectively, for the following reasons:

I.

Because said pleas offer no valid and legal defense to plaintiff's suit.

II.

Because the statute of limitations of one year, pleaded in said third plea, does not apply to or operate against plaintiff's suit.

III.

Because the statute of limitations of three years, pleaded in said third plea, does not apply to or operate against plaintiff's action.

Wherefore the plaintiff demurs and prays judgment, etc.

C. P. Goree,
L. A. Dean,
Westmoreland Bros.
J. L. Foust,
Attys. for Plaintiff.

(Here follows "Replication," filed Oct. 8th, 1901.)

In the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee.

City of Atlanta

vs.

Chattanooga Foundry & Pipe Works and South Pittsburg Pipe Com-Company.

Replication.
No. 647.

And now comes the plaintiff by attorney, and for replication to the defendants' fourth plea by it above pleaded, says:

That the plaintiff's said action did not accrue more than three years before action brought, and this the plaintiff prays may be inquired of by the country.

II.

That heretofore, to wit, on the —— day of December, 1894, the defendants, the Chattanooga Foundry & Pipe Works and the South Pittsburg Pipe Company, formed and entered into an unlawful and secret combination, trust and conspiracy with the certain other firms and corporations in the declaration mentioned, who are engaged in the same kind of business in which the plaintiffs were engaged, to wit, the manufacture and sale of cast iron pipe, fittings and specials as stated in the declaration, said combination, trust and conspiracy being named and styled the "Associated Pipe Works," and the plaintiff says that the said defendants and the other members of and parties to the said unlawful combination, trust and conspiracy in the declaration mentioned, held secret and clandestine meetings for the purpose of organizing and did secretly and clandestinely organize the said illegal combination, trust and conspiracy in the declaration mentioned, and did secretly and clandestinely agree among themselves to injure and defraud the plaintiff and others in like situation by means thereof, and agreed to conceal and did conceal the organization, existence and operations of said unlawful combination, trust and conspiracy, and did suppress and conceal the evidences thereof; and plaintiff says that said combination, trust and conspiracy was in its nature secret and clandestine, and was conceived and executed upon such a plan as to secure continued secrecy; and that the plaintiff purchased and paid for the cast iron pipe, fittings and specials in the declaration mentioned and paid the said bonuses and unlawful and fraudulent profits charged thereon as a part of the price of the said cast iron pipe, fittings and specials on the faith of and in reliance upon the statements and representations of the defendants and their confederates and co-conspirators in that behalf made that the price of the said cast iron pipe, fittings and specials was fixed, regulated and controlled by the price of iron, the cost of manufacture and the freight rates to the points of delivery, and the plaintiff was then, and for a long time after, remained in ignorance of the fact that the

said unlawful bonuses and profits were secretly and clandestinely and fraudulently charged as a part of the price of said pipe, fittings and specials in pursuance of the secret, clandestine and unlawful combination, trust and conspiracy hereinbefore mentioned, and the plaintiff's said ignorance was caused by the secrecy with which said unlawful combination, trust and conspiracy was conceived and executed; and the plaintiff says that afterwards, to wit, in the year 1896, the plaintiff was led to suspect that such an unlawful combination, trust and conspiracy had been entered into by the defendants and their confederates and co-conspirators and that same existed, and, for the purpose of investigating the facts as to the existence of such combination, trust and conspiracy, a committee was appointed by the plaintiff to diligently inquire into the matter, but the defendants, their associates, co-conspirators and confederates so carefully and successfully concealed the proofs and evidences of the existence of such combination, trust and conspiracy that its existence could not and was not discovered by the exercise of due care and diligence, and the plaintiff says that the defendants and their confederates and co-conspirators, to wit, the officers and representatives of the Anniston Pipe and Foundry Company, appeared before the said committee, appeared before said committee appointed as aforesaid to examine into the facts as to whether or not such a combination, trust and conspiracy existed and denied that any such combination, trust and conspiracy existed, and asserted and claimed that the prices charged for iron pipe, fittings and specials were fair and reasonable, and were based upon honest competition only, and were not controlled or regulated by any combination, trust or conspiracy; and plaintiff says that at another time, to wit, on or about the 25th day of January, 1897, after said unlawful combination, trust and conspiracy had been entered into as stated in the declaration, one of the officers of the defendant, Chattanooga Foundry and Pipe Works, made oath that his company had not entered into any contract or agreement for the purpose of wrongfully and fraudulently procuring unreasonable and extortionate prices for pipe, and at the same date the same officer made oath that his said company was compelled to accept such prices for pipe as were from time to time fixed by its competitors in the territory in which his said company might be operating at that time, and that the said defendant company had no voice or influence in fixing the price of pipe, but must take work at

the prices fixed by competition or suspend operation until the demand for pipe should guarantee a full supply of contracts to all engaged in a similar business with the defendant company, and the plaintiff says that these several statements so made by the defendants, their officers and confederates, were false and fraudulent, and were known to be false and fraudulent when made, and were made for the purpose of actively and effectually concealing the existence of said unlawful combination, trust and conspiracy and in furtherance thereof and of its secret character, and by means of these and similar and other false statements and affidavits and statements the said defendants and their confederates concealed and covered up the proofs and evidences of the existence of said unlawful combination, trust and conspiracy, and misled and deceived the plaintiff to such an extent that it was unable to discover that such unlawful trust, combination and conspiracy existed until long after they had purchased and paid for said cast iron pipe, fittings and specials, to wit, the 8th day of February, 1899, when the Supreme Court of the United States, notwithstanding the frequent statements to the contrary and denials of the defendants and their confederates, so decided in the case of the United States vs. The Addyston Pipe and Steel Company et al., and the plaintiff alleges that on the day and year aforesaid, and within less than three years next before the bringing of this suit, the plaintiff notwithstanding the fraudulent suppression and concealment of the facts on the part of the defendants and the other parties to said illegal and fraudulent contract, combination and conspiracy in the declaration alleged, did discover the facts aforesaid and did within less than three years after such discovery institute this present suit, and this the plaintiff is ready to verify.

Westmoreland Bros.,
L. A. Dean,
C. P. Goree,
J. L. Foust,
Attys. for Plft.

Term Caption.

Oct. 7th. 1901.

Be it remembered that at a Circuit Court of the United States begun and held for the Southern Division of the Eastern District of Tennessee at the Court rooms in the

City of Chattanooga within said District and the Sixth Circuit on the 1st. Monday it being the 7th. day of Oct. 1901. Present and presiding the Hon C. D. Clark, District Judge.

Among the proceedings had were the following to wit:

(Here follows "order" overruling demurrer to 3rd. & 4th. Pleas. Filed Oct. 8th. 1901.)

In the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee.

City of Atlanta,

vs.

Chattanooga Foundry & Pipe Works, et-al.

No. 647.

This cause was this day heard on plaintiff's demurrer to the third and fourth pleas of defendants, and the Court being of the opinion that the demurrer to the third plea is well taken, sustains the same, and strikes out said plea; and the Court being of the opinion that the demurrer to the fourth plea is not well taken, overrules the same; and plaintiff is allowed five days in which to make further defense to said fourth plea, and may file several replications thereto, if desired.

The plaintiff excepted to the action of the Court in overruling its demurrer to the fourth plea.

(Here follows "Demurrer to Replication" Filed Oct. 14th. 1901.)

City of Atlanta,

vs.

Chattanooga Pipe & Fdy. Works, and South Pittsburg Pipe Works.

Defendants come and demur to plaintiff's second replication to the fourth plea of the defendants filed herein.

First.

Because the said matter thereof is only applicable when the cause of action arises from fraud.

Second.

Because it is not applicable to actions at law.

Third.

Because the statute of limitations of the State of Tennessee, set up in defendant's plea, contains no exceptions in favor of plaintiffs, the parties from whom the cause of action has beeen concealed.

Fourth.

Because it is not alleged that Defendants fraudulently concealed from plaintiffs their cause of action.

Fifth.

Because no facts are alleged showing that defendants fraudulently concealed from plaintiffs their cause of action.

Sixth.

Because the plaintiffs failed to set out any facts showing that they exercised any diligence to find out or discover their right of action or discover the existence of the unlawful combination alleged; nor do plaintiffs show when and how the discovery was made and why it was not made sooner.

Seventh.

Because the facts alleged in plaintiff's declaration show that plaintiff's right of action was not fraudulently concealed from them, and the facts alleged show that plaintiffs more than three years before the bringing of the suit knew of the existence of the right of action.

Brown & Spurlock.

State of Tennessee, County of Hamilton.

Foster V. Brown makes oath that he is one of the attorneys of the defendant, and said demurrer is not interposed for delay.

Foster V. Brown.

Sworn to and subscribed before me this Oct. 14th. 1901.

A. F. Grayson, Deputy Clerk.

We certify in our opinion the foregoing demurrer is well founded in point of law.

Brown & Spurlock.

(Here follows "Amendment to Declaration" Filed Oct. 11th, 1902.)

In United States Circuit Court for Southern Division of Eastern District of Tennessee.

City of Atlanta,

vs.

The Chattanooga Foundry & Pipe Works and South Pittsburg Pipe Company.

Law. No. 647.

And now comes the plaintiff in the above entitled case and by leave of Court amends its declaration herein by averring as follows:

And plaintiff was injured by the defendants and their confederates by reason of the unlawful acts and deeds as before alleged in the like sum of fifteen thousand dollars, in its business of conducting a system of water works in Fulton County, Ga., in furnishing water to its customers and patrons for certain stipulated compensation from which business, plaintiff received large incomes which went into the City treasury, said unlawful acts and deeds being in violation of the Act of the U. S. Congress of July 2nd, 1890, to protect commerce against unlawful restraint and monopolies.

Plaintiff further avers that by reason of said unlawful acts and deeds as aforesaid it was injured and damaged in its property in said sum of fifteen thousand dollars, in violation of said Act of Congress of July 2, 1890. Plaintiff further amends and avers that in addition to the items on "Exhibits C" of its original declaration defendant furnished to plaintiff other cast iron pipe in Dec. 1896 at twenty-two dollars and seventy-five cents per ton amounting to one hundred and sixty-two and 10-100 dollars, for which plaintiff paid on the 11th day of Feb., 1897.

Westmoreland Bros.
L. A. Dean.
C. P. Goree,
J. L. Foust,
Plaintiff's Attorneys.

This amendment allowed this Oct. 11, 1902.
C. D. Clark, U. S. Judge.

Term Caption.

Oct. term 1903.

Be it remembered, that at a Circuit Court of the United States begun and held for the Southern Division of the Eastern District of Tennessee, at the Court rooms in the City of Chattanooga, within said District and the Sixth Circuit on the first Monday it being the 5th day of October, A. D. 1903. Present and presiding the Hon. C. D. Clarke, District Judge. Among the proceedings had were the following, to-wit:

Saturday Jan. 23rd.

Court met pursuant to adjournment.

Present and presiding the Hon. C. D. Clark, Judge of the United States District Court for the Eastern & Middle Districts of Tennessee.

(Here follows "Decree on Mandate.")

The City of Atlanta,

vs.

The Chattanooga Foundry & Pipe Works, et al.

No. 647.

This cause came on for hearing upon the mandate of the Circuit Court of Appeals for the Sixth Circuit in the words and figures following, to-wit:

United States Circuit Court of Appeals, for the Sixth Circuit.
United States of America, Sixth Judicial Circuit, ss:

The President of the United States,

To the Honorable the Judges of the Circuit Court of the United States for the Eastern District of Tennessee—Greeting:

Whereas, lately in the Circuit Court of the United States for the Eastern District of Tennessee, before you or some of you, in a cause between City of Atlanta, plaintiff and the Chattanooga Foundry & Pipe Works, defendants, a judgment was rendered in favor of said defendant and against said plaintiff as by the inspection of the transcript of the record of the said Circuit Court, which was brought

into the United States Circuit Court of Appeals for the Sixth Circuit by virtue of a writ of error agreeably to the Act of Congress, in such cases made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and three, the said cause came on to be heard before the said United States Circuit Court of Appeals for the Sixth Circuit, on the said transcript of record, and was argued by counsel:

On consideration whereof; It is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court, in this cause be and the same is hereby reversed with costs and the case is remanded to the said Circuit Court with directions to award a new trial. December 8th, 1903.

You, therefore are hereby commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said writ of error notwithstanding.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, the 18th day of Jan. in the year of our Lord one thousand nine hundred and four.

Costs plaintiff in error.

Clerk,	$ 31 30
Printing record,	239 30
Attorney,	20 00
Total,	$290 60

(Seal.)

Frank O. Loveland,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit."

And upon consideration thereof it is hereby ordered and adjudged that the former judgment of this Court be set aside and a new trial awarded, and that the defendant herein pay to the plaintiff herein the costs incident to the writ of error.

Enter this, Clark, Judge.

(Here follows "Amended Declaration" Filed July 13th, 1904.)

United States Circuit Court for the Southern Division of the Eastern District of Tennessee.

City of Atlanta,

vs.

The Chattanooga Foundry & Pipe Works and South Pittsburg Pipe Company.

No. ——

On the Law Docket.

And now comes the plaintiff by leave of the Court, and amends its declaration filed in the above stated cause, April 2, 1900, in the following particulars, to-wit:

1. By striking from said declaration all that part thereof beginning with the word "eight" in the fifth line from bottom of page two of said declaration, and ending with the word "Georgia" in the 23rd line of the 3rd page of said declaration, and substituting therefor, the following words and figures, to-wit: "Seven thousand eight hundred and twenty-seven dollars and sixty-eight cents, consisting of 3172 pounds of fittings at 2 1-8 cents per pound for $67.40; 3532 lbs. of fittings at 2 1-2 cents per lb. for $88.30; 854 lbs. at 2 3-4 cents per lb. for $23.47 as shown by said Exhibit "A"; That is to say, 7558 lbs. of fittings for a total of $179.17, free on board cars Atlanta, Georgia; said fittings being worth, at said dates, only 2 cents per lb. or $151.16 f. o. b. cars Atlanta, Georgia; the difference between the trust price and the fair market value of said fittings being $28.01; and 173,667 tons of six inch cast iron pipe at $21.00 per ton for $3647.00, and 177,845 tons of six inch cast pipe at $22.50 per ton, for $4001.51, or for a total of $7827.68 as shown in Exhibit "A" f. o. b. cars Atlanta, Georgia, said cast iron pipe, at said dates, being worth only $15.85 per ton, f. o. b. cars Atlanta, Georgia; that is to say 351,512 tons of six inch cast iron pipe at $15.85 per ton, amounts to only $5571.46; the difference between the trust price and the fair market value thereof being $2077.-05; that from November 12, 1895, to December 30, 1895, both inclusive, the said Anniston Pipe & Foundry Company furnished and sold to plaintiff, cast iron pipe and fittings costing in the aggregate, $36,677.30 consisting of 51372 lbs.

of fittings at 2 1-2 cents per lb. for $1284.30; 5880 lbs of fittings at 2 cents per lb. for $117.76; and 7776 lbs. of fittings at 3 cents per lb.; that is to say 65036 lbs of fittings for $1635.34 as shown by said Exhibit "B" f. o. b. cars Atlanta, Georgia, said fittings being worth at said dates, only 2 cents per lb., or $1300.72 f. o. b. cars Atlanta, Georgia; the difference between the trust price and the fair market value of said fittings, being $334.62; and 10.15 tons of six inch cast iron pipe at $22 per ton for $223.30; 17.59 tons of ten inch cast iron pipe at $22.00 per ton for $386.98; and 1551.44 tons of 30 inch cast iron pipe at $22.00 per ton for $34131.68, or for a total of $34741.96 as shown by Exhibit "B" f. o. b. cars Atlanta, Georgia, said six inch and ten inch cast iron pipe, at said dates being worth only $15.85 per ton f. o. b. cars Atlanta, Georgia; that is to say 27.74 tons of said six and ten inch pipe at $15.85 per ton amounts to $439.67, and said thirty inch cast iron pipe at said dates being worth only $14.60 per ton; that is to say 1551.44 tons of thirty inch cast iron pipe at $14.60 per ton amounts to only $22651.02, or all of said pipe amounts to only $23090.69, the difference between the trust price and the fair market value thereof, being $11651.27; and that the said Anniston Pipe and Foundry Company, from June 9th, 1896 to January 30th, 1897, sold and furnished plaintiff, cast iron pipe and fittings costing in the aggregate, $11,849.27 consisting of 5350 lbs. of fittings at 2 cents per lb. for $107.00 and 37586 lbs. of fittings at 2 1-4 cents per lb. for $845.68 and 19447 lbs. of fittings at 2 1-2 cents per lb. for $486.17 or for a total of $1438.85, as shown by said "Exhibit "C" f. o. b. cars Atlanta, Georgia, said fittings being worth at said dates, only 2 cents per lb. that is $1247.66 f. o. b. cars Atlanta, Georgia; the difference between the trust price and the fair market value thereof being $191.19 and 148.191 tons of six inch cast iron pipe at $22.75 per ton for $2371.34; 84.552 tons of six inch cast iron pipe at $21.00 per ton for $1775.59; and .696 of a ton of ten inch cast iron pipe at $22.75 per ton for $15.83; 60.249 tons of twelve inch cast iron pipe at $22.75 per ton for $1370.66; 19,652 tons of sixteen inch cast iron pipe at $21.00 per ton for $412.69; 149.122 tons of twenty inch cast iron pipe at $22.00 per ton for $3280.68 and 8.072 tons of thirty inch cast iron pipe at $22.75 per ton for $183.63; that is to say, for a total of $10410.42 as shown by said Exhibit "C" f. o. b. cars Atlanta, Georgia, said six inch, ten inch, twelve inch and sixteen inch cast iron pipe at said dates being worth only $15.85 per ton; that is to say 313.34 tons at $15.85 amounts to only $4966.43 and said 20 inch and said 30 inch cast

iron pipe at said dates being worth only $14.60; that is to say 157.194 tons at $14.60 amounts to only $2295.03, or a total of $7261.46, f. o. b. cars Atlanta, Georgia; the difference between the trust price of said cast iron pipe, and the fair market value thereof being $3148.96; all of said pipe and fittings sold and furnished as aforesaid, being shipped by said Anniston Pipe and Foundry Company from its plant in Anniston, in the State of Alabama, to plaintiff, in the City of Atlanta, in Fulton County, in the State of Georgia.

2. By striking from the last two lines on page three of said declaration, the words "Fifteen thousand dollars" and substituting therefor, the words "Seventeen thousand four hundred and thirty-one dollars and ten cents."

3. By striking from the 3rd. and 4th. line on page four of said declaration, the words "Seven hundred and thirty-six dollars and twelve" and substituting therefor, "Three hundred and fifty-four dollars and twenty-five."

4. And plaintiff further amends said declaration as amended by amendment filed June 5th, 1900, in said cause, by striking out the last clause of the second paragraph of said amendment, the words "fifteen thousand dollars," and substituting therefor the following words: "Seventeen thousand four hundred and thirty-one dollars and ten cents."

5. By striking from the 6th and 7th lines of the 4th page of said original declaration the words "forty-five thousand dollars," and substituting therefor "fifty-two thousand two hundred and ninety-three dollars and thirty cents."

6. By striking from the 2nd and 3rd lines from the end of said original declaration, the word "five," and substituting therefor the word "ten."

7. And plaintiff further amend said declaration as amended by amendment filed in this cause October 11th, 1902, by striking from the 1st paragraph of said amendment "$15,000," and substituting therefor "$17,431.10," and by striking from the last sentence of said paragraph the words "fifteen thousand dollars," and substituting therefor "seventeen thousand four hundred and thirty-one dollars and ten cents."

8. Plaintiff further amends said original declaration, by adding to the paragraph which ends with the words "Exhibit A, B and C," on the last page thereof, the following, to wit: "Exhibit D hereto attached and made a part of this declaration is a correct tabulated statement show-

ing the items, prices charged and paid, fair market value and overcharges, the entire overcharges aggregating $17,-431.10, as set forth in the allegations of said declaration."

Westmoreland Bros.,
L. A. Dean,
J. L. Foust, and
C. P. Goree,
Attorneys for Plaintiff.

"Exhibit D."

Statement tabulating items and figures under Exhibits "A," "B" and "C," as set forth in allegations in said declaration as amended.

Under Exhibit "A."

Fittings.	Prices paid.		Fair market value.		Overcharges.
3172 lbs.	2 1-8 cents,	$67.40	2 cents,	$63.44	$ 3.96
3532 lbs.	2 1-2 cents,	88.30	2 cents,	70.64	17.66
854 lbs.	2 3-4 cents,	23.47	2 cents,	17.08	6.39
Pipe.	Prices paid.		Fair market value.		
173.667 tons, 6 in.	$21.00,	$3647.00	$15.85,	$2752.62	$ 894.38
177.845 tons, 6 in.	22.50,	4001.51	15.85,	2818.84	1182.67

Under Exhibit "B."

Fittings.					
51372 lbs.	2 1-2 cents,	$1284.30	2 cents,	$1027.44	256.86
5888 lbs.	2 cents,	117.76	2 cents,	117.76	000.00
7776 lbs.	3 cents,	233.28	2 cents,	155.52	77.76
Pipe.					
10.15 tons, 6 in.	$22.00,	$ 223.30	$15.85,	$ 160.87	62.43
17.59 tons, 10 in.	22.00,	386.98	15.85,	278.80	108.18
1551.44 tons, 30 in.	22.00,	34131.68	14.60,	22651.02	11480.66

Under Exhibit "C."

Fittings.					
5350 lbs.	2 cents,	$107.00	2 cents,	$107.00	000.00
37586 lbs.	2 1-4 cents,	845.68	2 cents,	751.72	93.96
19447 lbs.	2 1-2 cents,	486.17	2 cents,	388.94	97.23

Pipe.					
148.191 tons, 6 in.	$22.75,	$3371.34	$15.85,	$2348.84	..... 1022.51
84.552 tons, 6 in.	21.00,	1775.59	15.85,	1340.15	..... 435.44
.693 tons, 10 in.	22.75,	15.83	15.85,	11.03	..... 4.80
60.249 tons, 12 in.	22.75,	1370.66	15.85,	954.94	..... 415.72
19.652 tons, 16 in.	21.00,	412.69	15.85,	311.48	..... 101.21
149.122 tons, 20 in.	22.00,	3280.68	15.85,	2177.18	..... 1103.50
8.072 tons, 30 in.	22.75,	183.63	15.85,	117.85	..... 65.78
				Total overcharges	.....$17,431.10

Term Caption. Oct. Term, 1904.

Be it remembered, that at a Circuit Court of the United States begun and held for the Southern Division of the Eastern District of Tennessee at the court rooms in the city of Chattanooga within said district and the Sixth Circuit on the first Monday, it being the 3rd day of October, A. D. 1904. Present and presiding the Hon. C. D. Clark, District Judge. Among the proceedings had were the following, to wit:

Thursday, October 6th.

Court met pursuant to adjournment.

Present and presiding the Hon. C. D. Clark, Judge of the United States District Court for the Eastern & Middle Districts of Tennessee.

(Here follows "Order directing Pleas to be re-filed, filed Oct. 6th, 1904.)

City of Atlanta,

vs.

Chattanooga Foundry & Pipe Works, et al.

} No. 647.

By leave of the court defendants' pleas to the original declaration are allowed to be filed and stand as plea to the declaration as amended.

Thursday, October, 13th.

Court met pursuant to adjournment.

Present and presiding the Hon. C. D. Clark, Judge of the United States District Court for the Eastern & Middle Districts of Tennessee.

(Here follows "Order sustaining Demurrer to 3rd. and 4th pleas.)

Filed Oct. 13th.

City of Atlanta,

vs.

Chattanooga Foundry & Pipe Co., and South Pittsburg Pipe Co. } No. 674

This cause came on for hearing on plaintiff's demurrer to defendants' third and fourth pleas filed August 16, 1901, and re-filed to-day, and the court having heard and understood the demurrer and in accordance with the opinion of the United States Circuit Court of Appeals rendered in this cause, is of opinion that said demurrer is well taken and the said third and fourth pleas of the statute of one and three years is stricken out.

This order was made on the 6th day of October 1904 and is entered now for then.

Westmoreland Bros.,
C. P. Goree,
L. A. Dean,
J. L. Foust,
Attys. for Plff.
Brown & Spurlock.

Enter this, Clark, J.

Friday, October, 14th.

Court met pursuant to adjournment.

Present and presiding the Hon. C. D. Clark, Judge of the United States District Court for the Eastern & Middle Districts of Tennessee.

(Here follows "Judgment" filed Oct. 14th, 1904.)

City of Atlanta,

vs.

Chattanooga Foundry & Pipe Works et al. } No. 647.

Came the parties by their attorneys, came also the same jury to wit, Sam DeArmond, J. B. King, Bruce Guthrie, John L. Christian, John Barnett, Thomas Hughes, D.

B. Goforth, I. L. Gleaves, Wm. Thomas, Sol. Giesmer and J. L. Price, who on yesterday, were, from rendering a verdict, respited until to-day, and who now upon their oaths do say that they find the issues in favor of the plaintiff and against the defendants, Chattanooga Foundry & Pipe Works and the South Pittsburg Pipe Company, and assess plaintiff's damage at fifteen hundred ($1,500) dollars, together with twenty-five hundred ($2,500) dollars attorneys' fee.

And thereupon, on motion of plaintiff's attorneys, and it appearing to the court that this is a suit under Section 7, of the Acts of Congress, commonly called the Anti-trust Act; it is ordered and adjudged by the court that the plaintiff's damage be trebled, pursuant to the provisions of said act, making in the aggregate when so trebled, the sum of forty-five hundred ($4,500) dollars, and which, together with the attorneys fees of twenty-five hundred (2,500) dollars makes a total aggregate of seven thousand ($7,000) dollars.

Whereupon it is considered by the court that the plaintiff have recovered of the defendants, The Chattanooga Foundry & Pipe Works and the South Pittsburg Pipe Company as damages said sum of forty-five hundred ($4500) dollars, together with the attorneys' fee of twenty-five hundred ($2,500) dollars, in all seven thousand dollars, and all the costs of the cause, for which execution is awarded.

Saturday, October 15.

Court met pursuant to adjournment.

Present and presiding the Hon C. D. Clark, Judge of the United Ctates District Court for the Eastern & Middle Districts of Tennessee.

(Here follows "Motion by defendants for new trial," filed Oct. 15th, 1904.)

City of Atlanta,

vs.

Chattanooga Foundry & Pipe Works, et al. } No. 647.

Came the defendants by their attorneys, Brown &

Spurlock, and moved the court to grant them a new trial, which motion was by the court, continued for action thereon to a future day.

On application of defendants, they are allowed thirty days in which to have prepared, signed and filed their bill of exceptions to the judgment and action of the court in this case.

(Here follows "Order amending order of Oct. 13th, 1904, filed Oct. 15th, 1904.)

City of Atlanta,

vs.

Chattanooga Foundry & Pipe Works, & South Pittsburg Pipe Company.

No. 647.

The defendants are hereby allowed to amend the order of this court entered at a former day of this term sustaining plaintiffs' demurrer to defendants' pleas of the statutes of limitations so as to reserve exceptions to said order.

(Here follows "Motion for a new trial," filed Oct. 26th, 1904.)

In the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee.

City of Atlanta,

vs.

Chattanooga Foundry & Pipe Works, & South Pittsburg Pipe Company.

On Law Docket. No.

The plaintiff being dissatisfied with the verdict rendered in the above entitled cause on the 14th day of October, 1904, now comes and moves the court for a new trial in said cause, on the following grounds:

1. Because the court erred in admitting the evidence of Bowron, Callahan, Lemoyne, Giles and Wistar, as to

the cost of the production of cast iron pipe and specials, for the purpose of enabling the jury to arrive at the true value of said products, including shop cost, cost of maintenance of plant, including wear and tear of machinery etc.; plaintiff having introduced uncontradicted evidence to show that the defendants had offered to sell said products in free territory at certain stipulated prices, averaging about $14.00 per ton f. o. b. cars Chattanooga, Tennessee, which was the price at which plaintiff could have bought said products, but for the action of the unlawful combination in raising the price; the cost of production not being germane to the issue in this case.

2. Because the court erred in charging the jury as follows:

"Now, if there was no established market price fixed for buying and selling, then the price at which the plaintiff would have a right to buy and the defendants to sell, would be the fair and just value of it. You only reach that second injury, provided you don't find that there was an established fair market price for it. If you do, follow that. If you do not, why then you would proceed to determine what would be a fair price, and in doing that you may look at the cost of production, including the cost of the original pig iron, and all of the material that goes into cast iron pipe, and the cost of selling it, and the freight to where it was sold, was in this case the freight being pre-paid and when you do ascertain what would be a fair and reasonable and just price, then it would be your duty to determine whether or not there was a difference between that fair, reasonable and just price, and the price which the city was compelled to pay, and if there was a difference, then that would be the plaintiff's measure of damages sustained, and would constitute the sum that you are to return into court, that is your verdict should be for that," to which plaintiff duly excepted.

The particular error complained of, being that the court authorized the jury to look at the cost of production, including the cost of the original pig iron, and all of the material that goes into cast iron pipe, and the cost of selling it, and the freight to where it was sold as in this case, for the purpose of ascertaining what would be a fair and reasonable and just price for the cast iron pipe and specials, sold by the Anniston Pipe and Foundry Company to plaintiff, and to determine whether there was a difference between that fair, reasonable and just price arrived at in looking at the cost of production etc., and the price which

the city was compelled to pay, and in instructing the jury that this difference would be the measure of plaintiff's damages, for the reason that plaintiff introduced evidence which was uncontradicted, showing that the defendants had offered to sell cast iron pipe in free territory at fixed prices, substantially like the pipe sold by the Anniston Pipe and Foundry Company, to plaintiff, in kind and quality, and for the further reason that the cost of production is not one of the issues in this cause, under the pleadings.

3. Because the court erred in charging the jury as follows:

"In determining in the first place, whether there was an established, general market price for products substantially like this in kind, quality and quantity, sold under conditions like this you will look to the whole of the evidence on both sides; you will look to any proof as to the prices the defendants sold goods or quoted the price of goods, in what is called free territory, that is territory outside of these reserved cities, and the conditions under which they sold them or quoted them, and determine whether or not those conditions were different substantially, from the conditions under which they were furnished under the contract.

If under the contract there was anything existed which demanded any particular quality or strength of pipe, owing to the test which was to be applied to it, or if there was an unusual responsibility attached to a party making such a contract, or furnishing pipe to a city like Atlanta, as distinguished from selling it on the market, or at other places, why then you will take that into consideration in determining first, whether there was an established market price, and also in determining whether the price was reasonable," to which plaintiff duly excepted, because the evidence introduced by the plaintiff under the first theory of the charge, with regard to arriving at the fair market value of the cast iron pipe in a free and open market, was wholly uncontradicted, and this evidence showed that the pipe sold by the Anniston Pipe & Foundry Company to plaintiff, was like the pipe, in all respects, which the Chattanooga Foundry & Pipe Works quoted at fixed prices, to its agent, Flynt and also quoted to various parties in free territory, from which evidence the jury must have found the price at which plaintiff could have bought pipe, but for the action of the trust, in raising it and fixing it, at the prices at which it was sold to plaintiff by said Annis-

ton Pipe & Foundry Company and for the reason that the court instructed the jury that they might take into consideration, if the contract demanded any particular quality or strength of pipe, owing to the test which was to be applied to it, or if there was an unusual responsibility attached to a party making such a contract, or furnishing pipe to a city like Atlanta, as distinguished from selling it on the market or at other places, for the purpose of determining first, whether there was an established market price, and also in determining whether the price was reasonable.

This not being one of the issues in the case, under the pleadings; the question not being whether the price was reasonable, but at what price could the city of Atlanta have bought this pipe for, in a free and open market.

4. Because there is no evidence upon which to base the findings of the jury as to the amount of damage sustained by plaintiff fixed at $1,500 by the verdict.

5. Because the court erred in submitting to the jury, the evidence relating to the cost of the production of cast iron pipe and specials, for the purpose of enabling the jury to arrive at their true value, this not being one of the issues in said cause, under the pleadings.

6. Because the evidence submitted to the jury by the plaintiff which was entirely uncontradicted, as to what plaintiff could have bought cast iron pipe in a free and open market during the years 1895 and 1896, shows that the difference between this price, and the price which it was forced to pay by reason of the action of the unlawful combination in raising the price of cast iron pipe, and forcing the plaintiff to pay said price, amounts to $16,662, and the verdict of the jury should have been for this amount instead of for $1,500 damages.

7. Because the finding of the jury as to the amount of a reasonable attorney's fee, which was fixed at $2,500, is not supported by the evidence, or the weight of the evidence introduced on the trial of the cause.

8. Because the verdict as to the amount of the damages fixed by the verdict, is not supported by the evidence, or the weight of the evidence introduced on the trial of the cause.

9. Because the verdict is contrary to that part of the charge of the court, which is in the following language, to-wit:

"That now, is the basis of this lawsuit. It is necessary therefore, for the plaintiff to satisfy you by a fair

weight of the evidence, taken as a whole, that the price which it had to pay for this product, was a price above what it could have procured that product for in the market, but for the existence of this unlawful combination, and satisfy you with reasonable certainty, of the difference between the price it had to pay and what it ought to have paid, and that would constitute the measure of the recovery."

Westmoreland Bros.,
C. P. Goree,
L. A. Dean,
J. L. Foust,
Plaintiff's attorneys.

(Here follows "Bill of Exceptions," filed Nov. 12th, 1904.)

City of Atlanta,

vs.

Chattanooga Foundry & Pipe Works, and South Pittsburg Pipe Company

On the trial in this cause, the following evidence was introduced:

Plaintiff's Evidence.

The plaintiff introduced evidence tending to show that it had purchased from the Anniston Pipe and Foundry Co. pipe and specials on the dates, and of the size and character stated in the declaration and Exhibits "A," "B," and "C" thereto. And it was admitted that at the time of these purchases, except those made in the year 1897, that there was a combination in restraint of trade existing between the several corporations named in the declaration, including the defendants to this suit and the Anniston Pipe and Foundry Company; that the form of said combination was as shown by the minutes of the association in the words and figures following, to-wit:

Exhibit No. 1.

Meeting Southern Association Pipe Works at their office, No. 8 Bates Block, Chattanooga, Tenn., December

28th, 1894. Meeting called to order by Chairman Downing at 11 a. m. Present; F. B. Nichols, J. K. Dimmick, Geo. E. Downing, M. Llewellyn and E. B. Thomasson, George E. Downing,, Chairman, J. W. Thornton, Acting Secretary.

The question of admitting Louisville and Cincinnati shops into the Southern Association was taken up after a full discussion, the following resolution was offered by J. K. Dimmick.

Resolved, that the proposition as submitted by Mr. F. B. Nichols be adopted:

Proposition of F. B. Nichols.

1st. The bonuses on the first 90,000 tons of pipe secured in any territory, 16 inch and smaller sizes shall be divided equally among the six shops.

2nd. The bonuses on the next 75,000 tons, 30 inch and smaller sizes, to be divided among five shops, South Pittsburg not participating.

3rd. The bonuses on the next 40,000 tons, 36 inch and smaller sizes, to be divided among four shops, Anniston and South Pittsburg not participating.

4th. The bonuses on the next 15,000 tons, consisting of all sizes of pipe shall be divided among three shops, Chattanooga, Anniston and South Pittsburg not participating. The above division is based on the following tonnage of capacity:

South Pittsburg,	15,000 tons.
Anniston	30,000 tons.
Chattanooga,	40,000 tons.
Bessemer,	45,000 tons.
Louisville,	45,000 tons.
Cincinnati,	45,000 tons.

When the 220,000 tons have been made and shipped and the bonuses divided as hereafter provided, the auditor shall set aside into a reserve fund all bonuses arising from the excess of shipments over 220,000 tons and shall divide the same at the end of the year among the respective companies, according to the percentage of the excess of tonnage they may have shipped (of the sizes made by them) either in pay or free territory. The above proposition is intended to include all ordinary pipe specials in the tonnage named. It is also the intention of this propo-

sition that the bonuses on all pipe larger than 36 inch in diameter shall be divided equally between the Addiston Pipe and Steel Company, Dennis Long and Company, and the Howard-Harrison Iron Company.

Pending the discussion of Mr. Demmick's motion, the meeting adjourned at 2 p. m. for dinner.

The meeting was called to order by the chairman at 3 p. m. Messrs. Long and Callahan represented Louisville shop and Haughton and Davis representing the Cincinnati shop were present.

The chairman of the meeting stated that the object of the meetings was to determine whether the Louisville and Cincinnati shops would be willing to become members of the association.

He went over the ground and dwelt on the advantages that would result from an association as it could be conducted by the six shops and also presented the disadvantages of working separately and cutting of prices and other disastrous consequences that had resulted in the past disorganization, jealousy and rivalry in business. He explained some of the working of the Southern Associatio and set forth some of the advantages resulting from a thorough knowledge on the part of each member of the Southern Association of the business situation in the territory in which the association had operated during the past year.

The resolution of J. K. Dimmick, providing for the passage of the proposition as submitted by Mr. Nichols. (F. B. Nichols) was voted upon and all companies voted "aye" the Cincinnati representatives, however, reserving the privilege of submitting the proposition as voted upon to the directors of their company for their approval.

Memorandum of agreement based upon proposition of F. B. Nichols, which has already been agreed upon by the undersigned, this 28th day of December, 1894:

1st. Resolved; that this agreement shall last for two years from the date of the signing of same, until Dec. 31st, 1896.

2nd. On any question coming before the association requiring a vote, it shall take five affirmative votes thereon to carry said question, each member of this association being entitled to but one vote.

3rd. The Addyston Pipe and Steel Company shall handle the business of the Gas and Water Companies of Cincinnati, Ohio, Covington and Newport, Ky., and pay the bonus hereafter mentioned, and the balance of the parties

to this agreement shall bid on such work such reasonable prices as they shall dictate.

4th. The Dennis Long & Company, of Louisville, Ky., shall handle Louisville, Ky., Jeffersonville, Ind., and New Albany, Ind., furnishing all the pipe for gas and water works in above named cities.

5th. The Anniston Pipe and Foundry Company shall handle Anniston, Alabama and Atlanta, Ga., furnishing all pipe for gas and water works companies in the above named cities.

6th. The Chattanooga Pipe and Foundry Company shall handle Chattanooga, Tenn., and New Orleans, La., furnishing all Gas and Water pipes in the above named citie

7t The Howard-Harrison Iron Company shall handle Bessemer and Birmingham, Ala., and St. Louis, Mo., furnishing all pipe for gas and water companies in the above named cities; extra bonus to be put on East St. Louis and Madison, Ill., so as to protect the prices named for St. Louis, Mo.

8th. South Pittsburg Pipe Works shall handle Omaha, Nebraska, on all sizes required by that city during the year 1895, conferring with the other companies and co-operating with them; thereafter they shall handle the gas and water companies of Omaha, Neb., on such sizes as they make.

Note: It is understood that all of the shops who are members of this association shall handle the business of the gas and water companies of the cities set apart for them including all sizes of pipe made by them. The following bonuses were adopted for the different states as named below. All railroad or culvert pipe or pipe for any drainage of sewerage purpose on 12-inch and larger sizes shipped into bonus territory shall pay a bonus of one dollar per ton. On all sizes below 12-inch and shipped into bonus territory for the purpose above named, there shall be a bonus of $2.00 per ton.

List of Bonuses.

Alabama	$3.00
Birmingham, Ala.	$2.00
Anniston, Ala.	$2.00
Mobile, Ala.	$1.00
Arizona Territory	$3.00
California	$1.00
Colorado	$2.00
Indian Territory	$3.00
Kentucky	$2.00

Mississippi	$4.00
Montana	$3.00
Nevada	$3.00
North Carolina	$1.00
South Carolina	$1.00
Tennessee, East of Cleveland	$2.00
Tennessee, Middle and West	$3.00
Texas, interior	$3.00
Texas Coast	$1.00
Utah	$4.00
Wyoming	$4.00
Washington Territory	$1.00
Oregon	$1.00
Iowa	$2.00
North Dakota	$2.00
South Dakota	$2.00
Florida	$1.00
Georgia	$2.00
Atlanta, Ga.	$2.00
Georgia Coast Points	$1.00
Idaho	$2.00
Kansas	$2.00
Louisiana	$3.00
Missouri	$2.00
Nebraska	$3.00
New Mexico	$3.00
Oklahoma	$3.00
Wisconsin	$2.00
Minnesota	$2.00
Illinois, except Madison and East St. Louis as previously provided	$2.00
Indiana	$2.00
Michigan	$1.50
Ohio	$1.50
West Virginia	$1.00

All other territory free.

On motion of Mr. Llewellyn, the bonuses on all city work, especially reserved shall be $2.00 per ton.

It is agreed in the first place that every order shall be reported daily whether from free territory or bonus territory giving consignee and destination.

Reports of shipments shall be made on the 1st, and 16th of each month for the preceding half months shipments and the auditor is hereby authorized to draw on each company at sight for their debit balances for the time reported.

Resolved, that every member of this Association be required to file with the auditor a report of all orders on their

books at the date that this Association goes into effect and that the report shall be final and binding and only such orders shall be exempted from bonus payments in pay territory; further as soon as it is ascertained that all have agreed to come into this Association that they at once notify the parties to whom they have made quotations withdrawing the same at once, and no orders are to be accepted on quotations previous to entering into this agreement by the parties hereto, unless they are willing to pay the bonuses established.

The following Resolution was offered by W. L. Davis:

Resolved, at any meeting of this Association, at any time, any member having grievances against any buyer for default of payment or other grounds, complaint may be submitted at a meeting and ask the co-operation of the other members in such a manner as may be decided upon to compel the adjustment of said grievance either by refusing to quote the party in default on pipe or such other means as the Association may agree upon. Or the party aggrieved shall at once report the complaint to the auditor who shall make carbon copies and send one to each member of the Association.

Agreed that all quotations after this date forwarded shall be made with a view of paying bonuses as fixed this date until further advised.

Following Resolution was offered by F. B. Nichols:

Resolved, that Mr. Llewellyn be made acting chairman under this agreement until he has relief and that in the event that the Addyston Pipe and Steel Company conclude at their board of Directors meeting to confirm the action of their representatives, Messrs. Haughton and Davis, at meeting today, that they wire Mr. Llewellyn and that he on receipt wire each of the other parties hereto and that the agreement shall then immediately go into effect and become binding on all parties.

Resolved, that the Acting Secretary mail copy of these minutes to each party hereto on tomorrow, December 29th, 1894.

The following resolution was offered by F. B. Nichols:

Resolved, that in the event that this Association is entered into that the Howard-Harrison Iron Company release each and every party from their obligation in reference to Minneapolis, letting January 7th, 1895; in the event that the agreement is not entered into, the Howard-Harrison Iron Company are still to endeavor to handle under agreement entered into at Chicago and subsequently changed at Minneapolis.

Exhibit No. 2. McClure.

At a meeting of the Associated Pipe Works, 8 Bates block, Chattanooga, Tenn., January 23rd, 1895, the following by-laws were adopted:

1st.

This Association shall last two years from January 1st, 1895, and shall have an Executive Committee consisting of one member from each Company.

2nd.

The officers of this Association shall be:

Sec. 1st. A Chairman who shall preside at all meetings and call special meetings when he may deem advisable and have general supervision of the affairs of the Association.

Sec. 2nd. An Auditor who shall have an office at Chattanooga and shall keep the records of the Association and perform the duties of Secretary in the absence of a regularly appointed secretary, make such reports and statements as may be hereinafter provided checking the books and accounts of the several shops (who are members of this Association) and perform such other duties as may be hereafter assigned to him.

Sec. 3. An assistant to the auditor who shall perform duties of the Auditor during his absence from the office of the Association and assist him regularly in all of the duties of the office.

3rd.

Sec. 1st. Each shop shall report daily to the auditor all orders secured in bonus or free territory, giving the shop number of same, number of pieces of each size and the weight per piece or such part of both as can be given from the nature of the order.

Sec. 2. On the 1st and 16th, of each month they shall report to the Auditor, all shipments made in all territory giving shop number, destination and sizes of each shipment and a summary in tons or pounds; showing the amount of bonus and tonnage of the bonus as well as free territory.

4th.

Sec. 1. The Auditor shall make carbon copies daily of all reports received and send one to each shop, and to such others as may be designated.

Sec. 2. He shall keep such records and accounts as

will enable him to exhibit at all times the exact status of the affairs of the Association.

Sec. 3. He shall on the 1st, and 16th, of each month, or as soon as practicable send to each shop a statement of all shipments reported in the previous half month with a balance sheet showing the total amount of the premiums on shipments, the division of the same and a debit credit balances of each Company; also a statement of free orders secured during the same period; and a memorandum of balance payable from one to another.

5th.

Sec. 1. The Auditor shall once each month thoroughly check the books of each company in such a manner as may be necessary to determine the fact that all orders secured and shipments made, the bonuses paid into the Association, have been properly made and performed by each member of the Association, and shall make a monthly report to all of the parties of the Association, of the results of checking of the books of each company; and shall be authorized to charge and credit each company in such manner as may be necessary to make the books and records correct, according to the basis of the agreement entered into December 28th, 1894, and further amended and perfected this date.

On motion letter of Mr. C. W. Harrison, in regard to Chadwick and Tolono, Ills., reported by Cincinnati was referred to Mr. B. F. Haughton, V. P., for explanation.

Moved by Mr. Dimmick, that Maj. Downing and C. W. Harrison, agent, be requested to withdraw all quotations on Lincoln, Neb., and that if the order is taken the new bonus be paid.

Adopted.

Messrs. Dennis Long & Co. reported Minneapolis bids were received January 7th, and rejected, the Committee authorized to purchase pipe in the open market without advertisement.

The following resolution was adopted:

Whoever has a representative at any public letting shall instruct him to send to the auditor a full list of the bids and bidders on same; also that all information in regard to work taken in pay territory by the shops outside of this Association shall be reported to the Auditor, who shall keep a proper record of such information and send carbon copies of same to all the members of this Association.

It was agreed that the six members of this Association divide the expenses of the Chattanooga office share and share alike.

On motion meeting adjourned.

Exhibit 3, McClure.

Meeting of the Associated Pipe Works at "Lookout Inn", Lookout Mountain, Tenn., Present, F. B. Nichols, A. F. Callahan, M. J. Boots, J. M. Dudley, W. L. Davis, C. W. Gray, D. L. Miller, C, W. Harrison, B. F. Haughton, J. R. Rice, M. Llewellyn, D. Giles, W. H. Flint, J. G. Miller, E. B. Thomasson, J. K. Dimmick, D. R. P. Dimmick, and F. C. Miller.

Meeting was called to order by M. Llewellyn, Chairman, at 4:45 P. M. J. W. Thornton, Acting Secretary. Minutes of the previous meeting were read and approved.

Res. 1. A. F. Callahan, moved that upon all inquiries for prices from "Reserved Cities" for pipe required during the year 1896, that prices and bonus be fixed at a regular or called meeting of the principals. (This dictated by W. L. Davis.)

Seconded by J. K. Dimmick—Carried.

Res. 2. A. F. Callahan moved that the bonus on pipe supplied by the Addyston Pipe and Steel Company for the village of Westward under contract of last summer, that the bonus be corrected to $2.00 and the bonus on the Riverside contract, letting December 14th, be fixed at $2.00.

Seconded by W. L. Davis—Carried.

The following is a memorandum of F. B. Nichols, relative to matters which he desires to discuss at meeting to be held at Cincinnati January 10th, 1896;

1st. We, the Howard-Harrison Iron Company would like to have the head-quarters moved from Cincinnati to the City of Chicago owing to the fact that statement of our business proves that one quarter of our total tonnage is sold in the state of Illinois, and probably 25 per cent more of the total output is bought in and around the city of Chicago, and we, therefore, deem it of the utmost importance that our head-quarters be situated at a point where we come in direct competition with the bulk of our trade and our chief competitors.

2nd. We want the bonus for "reserved city" work to be adjusted upon an equitable basis to all.

3rd. We want our agreement changed to the following extent: Instead of the first 90,000 tons secured and shipped we want it to read, that the first 90,000 tons shipped into pay territory shall be divided equally, the other divisions to be in accordance with the basis for dividing 90,000 tons.

4th. We want to vote to correct any equalities for '96 that may have existed in '95.

5th. We want our agreement in all other respects to stand as was first written up.

Upon motion meeting adjourned at 6:30 p. m. to meet at the same place tomorrow 10 a. m.

Dec. 20th, 1895.

Meeting was called to order by M. Llewellyn, Chairman, at 11 a. m. All being present who participated in the meeting of the 19th, with the exception of Mr. D. L. Miller and Mr. J. R. Rice.

Res. 3. F. B. Nichols moved that Dennis Long & Co. be allowed to close contract for the year of 1896 with the Louisville Water Co., at the best price they can obtain for same, and after securing contract, refer the same to the meeting of the principals to fix bonus. Seconded by A. F. Callahan. Carried.

Res. 4. B. F. Haughton moved that the bonus on the Illinois Central order to put to $5. Seconded by J. E. Dimmick. Carried.

Res. 5. A. F. Callahan moved that the scale of prices as shown by card dated Aug. 15th, be adopted as the guide to committee on fixing prices until otherwise decided. Seconded by F. B. Nichols. Carried.

Res. 6 F. B. Nichols moved that the agreement shall be changed to read; that the first 90,000 tons of pipe shipped into pay territory is to be divided equally by all six shops and the rest of the agreement to be changed accordingly, taking effect after Jan. 1st, 1896, as follows:

1st. On the 1st 90,000 tons of pipe shipped into any pay territory 16 inch and smaller sizes shall be divided equally among the six shops.

2nd. The bonuses on the next 75,000 tons 30 inch and smaller sizes shipped into pay territory shall be divided among five shops, South Pittsburg not participating.

3rd. The bonuses on the next 40,000 tons shipped into pay territory 36 inch and smaller sizes to be divided among four shops, Anniston & South Pittsburg not participating.

4th. The bonuses on the next fifteen thousand tons shipped into pay territory consisting of all sizes of pipe shipped shall be divided among three shops, Chattanooga, Anniston & South Pitsburg not participating.

The above division is based upon the following tonnage capacity:

South Pittsburg,	15,000 tons.
Anniston,	30,000 tons.

Chattanooga,	40,000 tons.
Bessemer,	45,000 tons.
Louisville,	45,000 tons.
Cincinnati,	45,000 tons.

When the 220,000 tons has been shipped into pay territory and the bonuses divided as provided above, the Auditor shall set aside into a reserve fund all bonuses arising from excess of shipments over 220,000 tons, and shall divide the same at the end of the year among the respective companies according to the percentage of excess of the tonnage they may have shipped of the sizes made by them either into pay or free territory. Upon calling the roll of the above named companies to vote on the above resolution, they voted as follows:

Bessemer, aye.
Chattanooga, aye.
Anniston, aye.
South Pittsburg, aye.
Louisville, aye.
Cincinnati, (not prepared to vote.)

Upon motion meeting adjourned for lunch at 3 p. m.

Called to order at 4:30 p. m.

Res. 8. W. L. Davis moved to sell the 519 pieces of 20 inch pipe for Omaha, Neb., for $23.40 delivered. Seconded by B. R. P. Dimmick. Carried.

Res. 9. F. B. Nichols moved that Anniston participate in this bonus and the job be sold over the table. Seconded by W. L. Davis. Carried.

Pursuant to the motion the 519 pieces of 20 inch pipe for Omaha, was sold to Bessemer at a premium of $8.00 per ton. (J. W. T.)

Res. 10. J. K. Dimmick moved that the next meeting be held at Cincinnati, Jan. 10th, 1896. Seconded by F. B. Nichols. Carried.

Res. 11. P. F. Haughton made the following resolution: Resolved; that the visiting members of this association extend a vote of thanks to the Chattanooga Foundry & Pipe Works for so royally entertaining them. Carried.

Res. 12. Upon motion A. F. Callahan, and seconded by M. Llewellyn, Chairman, meeting adjourned at 4:20 p. m.

Exhibit No. 4.

Meeting of the Associated Pipe Works, at office 401 Temple Court, Chicago, Ill., March 13th, 1896.

At this meeting the following resolution was offered: "Moved that bonus on Anniston's Atlanta Water Works contract be fixed at $7.10, provided freight is $1.60 a ton. Carried.

Exhibit No. 8.

"Meeting Associated Pipe Works at Galt House, Louisville, Ky., May 16th, 1895. Present; A. F. Callahan, W. L. Davis, B. F. Haughton, J. W. Harrison, C. W. Harrison and M. Llewellyn, Meeting called to order by Chairman Llewellyn at 9:45 a m. J. W. Thornton, acting Secretary. Minutes of previous meeting was read and approved.

On motion of A. F. Callahan, it was decided to proceed with the regular business of the association with the understanding that same would be submitted to the representative from Anniston when he arrived for approval.

On motion of A. F. Callahan, the explanation of the Addyston Pipe and Steel Company in reference to Brightwood, Ind., was accepted and bonus of $2.00 as originally reported by them confirmed.

On motion the bonus for Dayton, Ohio, as reported by Cincinnati, was fixed at $3.00 for the first two hundred tons and $2.00 for the balance of the tonnage to make up the year's supply.

On motion of B. F. Haughton, the bonus on Port Clinton, Ohio, as reported by Cincinnati, was fixed at $2.00, instead of $1.50 as previously reported.

On motion it was declared that it was the sense of the association that whenever an order is reported by any shop and a doubt exists as to the proper bonus to be paid, that it be reported with the facts in the case, to be acted upon at the next meeting of the Executive Committee.

On motion it was resolved, that any party to this agreement having reported a bona-fide time contract upon which bonus is to be paid, shall be entitled to the protection of the other members of the association.

The Addyston Pipe and Steel Company reported a contract with the Big Four Railroad for all the culvert pipe to be used by them during the year 1895, and the same is subject to bonus.

At four p. m. meeting was called to order again; H. P Cooper, and O. P. McArthur, from Anniston and Bessemer, respectively, were present. The minutes of the morning meeting were read to H. B. Cooper, and received his approval.

On motion the additional 25 cents per ton specified by Anniston for Shelby, Michigan, be charged at $1.50 bonus and other additional orders be paid for at current bonus in force at the time that such orders are reported.

The following resolution was offered by John W. Harrison: "Whereas the system now in operation in this association of having a fixed bonus on the several States has not in its operation resulted in the advancements in prices of pipe as was anticipated; except in "Reserved Cities," and some further action is imperatively necessary in order to accomplish the ends for which this association was formed. Therefore; be it resolved, that from and after the 1st day of June that all competition on pipe lettings shall take place among the various pipe shops prior to the said letting. To accomplish this purpose it is proposed that the six competitive shops have a "representative board" located in some central city to whom all inquiries for pipe shall be referred, and said board shall fix the price at which said pipe shall be sold, and bids taken from the respective shops for the privilege of handling the order, and the party securing the order shall have the protection of all the other shops.

Should it be deemed best for the interest of this association to eliminate the Southern Territory from the control of "the general pool," and refer all lettings in said territory to the southern shops for their exclusive action, upon the agreement of the four southern shops to pay this association the fixed bonus now enforced on said southern States, said southern shops to have the option of doing so.

All division of bonuses to remain as now established during the year 1895.

It was moved by Mr. Callahan, that the resolution of Mr. John W. Harrison be referred to a committee of the whole to be definitely acted upon at a meeting to be held at the Galt House, Louisville, Ky., May 23rd, 2 p. m. Carried.

On motion meeting adjourned.

Exhibit No. 9.

In pursuance to call, meeting was held at Louisville, Ky., on May 27th, 1895, and Mr. John W. Harrison's resolution was ratified changing the bonuses from "fixed bonuses on the several States," to an "Auction Pool," as will be shown from copy of minutes below:

Called meeting of the Associated Pipe Works at Galt

House, Louisville, Ky., May 27, '95. Present, M. Llewellyn, A. F. Callahan, J. K. Dimmick, H. R. Cooper, B. F. Haughton, W. L. Davis, C. W. Harrison, E. B. Thommason, M. Llewellyn, Chairman, J. W. Thornton, acting secy.

After an informal discussion of the resolution offered by John W. Harrison, at Louisville, Ky., May 16th, 1895, it was decided to postpone definite action until arrival of Mr. Harrison, at 7:20 p. m.

At 4:30 p. m. meeting was adjourned until 7:30 p. m. At 9 p. m. meeting was called to order by Mr. Llewellyn, Chairman, John W. Harrison being present, as well as members who were present previous to the adjournment at 4:30 p. m.

The secretary was instructed to read resolution to John W. Harrison, as shown in the minutes of May 16th, which was done. Upon being properly moved and seconded the resolution of John W. Harrison was adopted as read.

The southern shops thereon elected to throw all the work into a "General Pool."

On motion the central office was fixed at Cincinnati, Ohio, dating from June 1st, 1895.

On motion of A. F. Callahan, it was resolved that when an inquiry is reported to which a member can properly establish a claim as a special customer, such inquiry should not be disposed of by the auction basis, but shall be handled by such member, the committee fixing the price and bonus, such price and bonus to be commensurate with prices and bonuses at the time such inquiry shall be reported.

On motion of A. F. Callahan, it was agreed that the question of the continuation of this association beyond December 31st, 1896, shall be taken up and decided by the association between the 1st and 15th of July, 1896.

On motion, B. F. Haughton and D. R. P. Dimmick were appointed a committee to secure offices in Cincinnati, Ohio.

On motion the question of Auditor's Assistant, salaries, etc., was left to a representative committee from the various shops.

On motion of W. L. Davis, it was agreed that all parties to this association having quotations out shall notify their customers that the same will be withdrawn by June 1st, 1895, if not previously accepted on or after June 1st, 1895, and not previously accepted and upon all business accepted on or after June 1st bonuses by the committee.

On motion meeting adjourned."

Exhibit No. 10.

"Copy" Chattanooga, Tenn. Feb. 15, 1896.
J. K. Dimmick, V. P.,
Anniston, Ala.
Dear sir:

We have the following inquiry from the Atlanta Water works office approximately 1,500 feet of 12 inch pipe, also about 10,000 feet of pipe varying from 6 to 10 inch with a lot of special castings. They state they are not prepared to give amount of different sizes, but will give order in good time after contract has been awarded. They ask for a reply on or before the 18th inst., and you will therefore please advise us at once as to what price you desire us to protect on this contract.

Yours very truly,
(Signed) Chattanooga Foundry & Pipe Works.,
By E. B. Thommasson.

Exhibit No. 11.

"Copy." Anniston Ala.,
Feb. 15th, 1896.
Chattanooga Foundry & Pipe Works,
South Pittsburg Pipe Works,
Howard-Harrison Iron Co.
Gentlemen:

Please protect $24.00 on approximately 375 tons of cast iron pipe for the city of Atlanta, Ga., on which we are asked to-day for prices, we have sent a man over to Atlanta and will get as much more as possible.

Very truly yours,
(Signed) J. K. Dimmick, V. P.

Exhibit No. 12.

"Copy." Chattanooga, Tenn., Feb. 17, 1896.
Mr. Park Woodward, Supt.,
Atlanta Water Works,
Atlanta, Ga.
Dear sir:

We are in receipt of yours of the 14th inst., and in answer we propose to furnish you pipe at the following prices approximately 1,500 feet of 12 inch, 10,000 feet

from 6 to 10 inch pipe for $24.50 per ton of 2,000 lbs., and special castings for 2 1-2 cents per pound, all delivered on board cars at Atlanta, Ga. We have catalogues now in process of printing and as soon as received we will take pleasure in mailing you a copy. We can give you prompt delivery on above pipe and would be pleased to receive your order.

Very truly yours,

(Signed) Chatta. Fdy. & Pipe Works
By E. B. Thommasson.

Exhibit No. 13.

("Copy.") Chattanooga, Tenn.
Feb. 21st, 1896.

Anniston Pipe and Fdy. Co.,
Anniston, Ala.

Gentlemen:

We received the following letter under date of Feb. 19th, 1896, from the Atlanta Water Works office:

Atlanta, Ga., Feb. 19th, 1896

Chattanooga Foundry & Pipe Works, Chattanooga, Tenn.

Bids for pipe were opened at the meeting of Board of Water Commissioners this a. m., and as all bids are extremely high it was moved and adopted that all bids be rejected, will say that the lowest bid was from R. D. Wood & Co., Philidelphia, Pa. Under such circumstances we would ask if it is not possible for a lower bid to be made from those who are so near the point, you might say, right at our door.

Hoping to hear more favorably from you at an early date we remain, with much respect,

Yours very truly,

(Signed) W. B. Torbett, Secy."

Plaintiff introduced further evidence tending to show that in the year 1896, the defendants were offering to sell, and did sell, pipe in free territory, as shown by the following letters and telegrams:

Exhibit No. 18.

Copy. Chattanooga, Tenn., Jany. 2, 1896.

Mr. W. H. Flint,
United Bank Building,
Cincinnati, Ohio.

Dear Sir:

Referring to our policy for '96 in bidding on pipe we have had this matter under consideration for some time past and from the information obtained from Mr. Thornton's statement as to the amount of business done last year in pay territory and from estimates we have made for business that will come into the territory for '96 we have been able to determine to what point we can bid on work and take contracts and if bonus is forced above this point, let it go and take the bonus. We note from your letter of yesterday that you have sized up the situation in its essential points, and it agrees exactly with our ideas upon the subject. It is useless to argue that the Howard-Harrison Iron Company, Cincinnati, and other shops who have been bidding bonuses of six to eight dollars per ton, can come out and make any money if they continue to bid such bonuses. In the case of Howard-Harrison Iron Company people in Jacksonville, Fla., the truth of the business is they are losing money at the price they bid for this work.

If they take contract at 19 dollars delivered, it will only net 16 dollars at the shop after they have paid back bonus of $4.75.

If they should continue to buy all the pipe that goes up to such figures as they have paid for Jacksonville and other points, they would wreck their shop in a few months. However, of course, they calculate this bonus will be returned to them on work taken by other shops. We are very much pleased with the bonus that has been paid and we only hope they will keep it up as it is only money in our pockets, as long as there is money to us let them make the pipe we shall continue to do so, for the present you will adopt the following basis:

On 16 and under standard weights, 14.25 at shop; on 16 and under light weights, 14.50 to 14.75; on 18 to 36, standard weights, $13.00 at shop.

That is you will bid all over 13.00, 14.25 and 14.50 on work.

If we get work at these prices it will be satisfactory, if the others run bonus above this point let them take it as it will be more money to us to take the bonus. We note Mr. Thornton's report of average premiums from June 1st, to December, that the average was $3.63. The average bonuses

that are prevailing today are about $7.00 to $8.00. We can not expect this to continue and we think your estimate of five dollars a ton average bonus is high, as we do not believe premiums for '96 will average that price, unless there is a decided change for the better in business.

We find there was sold and shipped into pay territory from Jany. 1st, 1895, to date, including the 40,000 tons of old business that did not pay a bonus, about one hundred and eighty-eight thousand tons, and we think a very conservative estimate of shipments into this territory will amount to fully two hundred thousand tons this year, more than that, probably over-run two hundred and forty thousand tons from the fact that the city of Chicago and several other places that annually use large quantities of pipe were not in the market last year, or last season, from the fact that they were out of funds. On the basis as given you above if the demand should reach two hundred and twenty thousand tons, which would give us our entire forty thousand tons, provided we did no business, then the association would pay to us the average bonus which might be from $3.50 to $5.00 on our forty thousand. If we cannot secure business in pay territory at paying prices, we think we will be able to dispose of our output in free territory and of course make some profit on that.

At the prices that the Howard-Harrison people paid for Jacksonville, Desplaines and one or two other points they are losing from $2.50 to $3.00 per ton, that is, provided, bonuses not to be returned to them, therefore when business goes at a loss we are willing that the other shops make it.

Just a few minutes ago we had a telegram from Nichols at Jacksonville, stating he could secure contract for water pipe at $19.00 and $19.19 for the sewer pipe and wanted to know how much small pipe we would furnish. We replied at once we did not want any of the business. He further more states that unless he takes contract at these prices that the job will be re-advertised.

We await with some interest the outcome of this matter as to whether Mr. Nichols will take the job or whether he will throw it off and let it come to a re-letting.

Very truly yours,

(Signed). Chatta. Fdy. & Pipe Works.
By E. B. Thomasson.

P. S. Don't leave this letter on your desk where it might fall into the hands of others. Make a memorandum and tear the letter up.

Above all things make a confident of no one in business matters.

Exhibit No. 19.

Copy telegram. Chatta., Tenn., April 14, 1896.

L. E. Wood, Agent.
100 Bdway, New York, N. Y.

Six inch thirty pounds $19.75 net ton Peabody, Mass.
Paid. (Signed). Chatta. Fdy. & Pipe Wks.

Exhibit No. 20.

Copy telegram. Chatta., Tenn., April 15, 1896.

L. E. Wood, Agent.
100 Bdway, New York, N. Y.

Will furnish pipe for Lockhaven, Penna., for $19.00 net ton delivered.
Paid. (Signed). Chatta. Fdy. & Pipe Wks.

Exhibit No. 21.

Copy telegram. Chatta., Tenn., April 10, 1896.

E. B. Thommasson, 401 Temple Court,
Chicago, Ill.,

Hope you will have time to call and see Clow, likely will make settement with you when there. We returned notes asked for cash settlement. Wood wires from Clifton, N. Y., that South Pittsburg bid 19.07, Anniston 18.75; Buffalo, 19.00; Utica, 19.00; Addyston, 19.20; McNeal and Runkle, 20.25.
Paid. (Signed). M. Llewellyn, Secy.

Exhibit No. 22.

Copy telegram. Chatta., Tenn., April 29, 1896.

Solvay Process Co.
Syracuse, N. Y.

Do not make 42 inch pipe, other sizes 18.45 ton two thousand pounds, small specials 2 1-4 cents, large 2 3-4 cents pound, all delivered on board cars, Syracuse, N. Y.

Complete shipment inside 30 days. Except as to spls. for large pipe.
(Signed). Chatta. Fdy. & Pipe Wks.

Exhibit No. 23.

Copy Telegram.
L. E. Wood, Agent.
100 Bdway, New York, N. Y.

Nineteen eighty net ton Malden, Mass. Prompt shipment. This is low figure, perhaps you can get more. Would

like to have you ascertain if possible what figure is required to take such orders.

(Signed). M. Llewellyn, Secy.

Paid Chg. Co.

The evidence of plaintiff tended to show that all the pipe furnished to the City of Atlanta by the Anniston Foundry & Pipe Company in the years 1895 and 1896 was furnished under and in accordance with three contracts, the first let to the lowest bidder in April, 1895, for the ordinary year's supply of that year; the second on the 6th. day of November, 1895, for the purpose of building a duplicate main; and the third let to the lowest bidder on March 4th, 1896, for the year's supply of that year.

Defendant' Evidence.

Defendant offered evidence tending to show the character of pipe to be furnished under specifications as required by the plaintiff for pipe to be used in its system of water works, and the reasonable and fair price considering and based on the cost of manufacturing and delivering to the City of Atlanta pipe of the character required by said specifications, and that, according to the manner in which cast-iron pipe was sold, it had no regular, fixed, market price, but that the amount asked for each lot of pipe depended on the specifications and requirements, at the time, of the shop filling the order, for work to keep all of its pits in operation; that the pipe sold to plaintiff by the Anniston Pipe Company in 1895 and 1896 was worth the price charged for it.

It introduced further evidence tending to show that the contract made with the Anniston Pipe and Foundry Company on November 30th, 1895, for 30-inch pipe, and other sizes was furnished under an agreement made between the plaintiff and the Anniston Pipe and Foundry Company, without advertising for bids, and at a time when the Water Commissioners of the City of Atlanta had no appropriation made to pay for said pipe, and therefore, no authority under the city code to make the contract; that said contract was an emergency order on account of a break which had recently occurred in the large main of the water works, and the price fixed therein was the price proposed by the Water Board of Plaintiff, and accepted by the Anniston Company under the circumstances stated. The contract for this pipe was in the words and figures following:

Exhibit "A" S. A. S.

Filed March 13th, 1902, Henry O. Ewing, Clerk.
State of Georgia, Fulton County.

These articles of agreement made and entered into this 6th, day of November, 1895, between the Anniston Pipe and Foundry Company of Anniston, Alabama, a corporation under the laws of Alabama, party of the first part, and the city of Atlanta a municipal corporation, under the laws of Georgia, party of the second part.

Witnesseth: That the party of the first part, in consideration of the prices hereinafter stipulated to be paid hereby agrees to sell the party of the second part sufficient thirty inch iron pipe for the purpose of constructing the second water main from Pumping Station No. 2, of the Water Works of the party of the second part, to such point as shall be designated by the board of Water Commissioners of the City of Atlanta, said pipe to be furnished at and for the price of twenty-two dollars ($22.00) per ton, f. o. b. cars at Atlanta, Ga. The exact amount of pipe to be furnished has not been ascertained but will approximate seven thousand feet.

The party of the first part further agrees to furnish to the party of the second part, iron pipes of other sizes and dimensions to be used on this line or the extensions thereof, at the same price per ton, in such quantities and at such times as the party of the second part shall deem necessary during the year 1895.

The party of the first part further agrees to furnish to the party of the second part such connections and other specials as the party of the second part may need, at the rate of two and a half cents per pound f. o. b. cars at Atlanta, Ga.

The party of the first part further agrees to begin to furnish said pipe and specials as aforesaid immediately and to supply the same to the party of the second part as rapidly as the party of the second part may need it, not to exceed 24 pieces per day, in the construction of said water main, or extensions thereof, so as not to delay the work of laying said pipes.

The party of the second part in consideration of the party of the first part carrying out this contract by furnishing pipes as aforesaid, agrees to pay for all the pipe and other material furnished by the party of the second part at the prices herein stipulated by the second day of January, 1896, without interest, and it is further agreed by

and between said parties that the title to said pipe and other material furnished in connection therewith by the party of the first part shall be and remain in the party of the first part until all of said indebtedness shall be paid, the party of the first part reserving the right, and the said right being hereby granted to it, to enter upon the premises where said pipes is or maybe laid, and take the same up and remove it therefrom in case of default in payment and the party of the second part grants to the party of the first part the right to cut off the water from said mains for the purpose of removing the same, should it be necessary.

It is further agreed that all pipes, specials etc., furnished by the party of the first part to said city shall be in accordance with the specifications, a copy of which is hereto attached, and which is hereby referred to and made part of this contract.

This contract on the part of the City of Atlanta, is made for the public good and safety, which requires a second water main from Pumping Station No. 2, of the Water Works of the party of the second part to a certain point to be designated by the Board of Water Commissioners of the City of Atlanta, and in pursuance of the resolution of the Mayor and General Counsel of the City of Atlanta, copy of which is hereto annexed.

In witness whereof, the parties have hereunto executed this contract in duplicate this 6th, day of November, 1895.

Porter King,
Mayor of the City of Atlanta,
George B. Hillyer, Prest.
Board of Water Commissioners,
Anniston Pipe and Foundry Co.,
J. K. Demmick, Vice-Pres.
H. B. Coosa, Secy.

Defendant introduced further evidence tending to show that in May, 1896, the complainant was informed of the combination existing between defendants and the other pipe companies named in the declaration, and about that time appointed a committee for the purpose of investigating and reporting to the Board the evidence showing the existence of said combination, and which consisted of the minutes of the association, and other letters and telegrams, copies of which were then in the hands of one, J. E. McClure, who exhibited the same to said committee, that on June 2nd, 1896, at a meeting of plaintiff's board of Water Commissioners, the following resolution was passed;

"Resolved, that the President of this Board write to the Anniston Pipe and Foundry Company, making a demand for the shipment of pipe, according to order made by us May 20th, and accepted by the Anniston Pipe and Foundry Company. The especial attention of the Pipe Company is called to the fact that the order was given by the board, and no committee had any right to modify it in any particular, and that the action of the Board is binding on the City."

That on September 19, 1896, said Board also adopted the following resolutions:

Resolved; that the bill of the Anniston Pipe and Foundry Company be paid upon the execution of a valid agreement with the said company, that such payment does not operate as a waiver of any right the city has in the premises to recover any excess, over-charge or illegal charge collected by said company, and does not operate as an estoppel against the prosecution of any right the city may have in any court of law or equity."

Therefore the folowing agreement was executed:

Exhibit "B" S. A. S.

Filed March 13th, 1902.

Henry O. Ewing, Clerk.
by J. C. Phillips, Deputy.

State of Alabama, Calhoun County:

This agreement made and entered into this 24th day of September, 1896, by and between the Anniston Pipe and Foundry Company, a corporation under the laws of the State of Alabama, party of the first part, and the city of Atlanta, party of the second part, witnesseth:

That whereas the party of the first part has made shipments of cast iron water pipe, specials and fittings to the party of the second part, as shown by invoices, and monthly statements which are hereby referred to and incorporated herein, and made part hereof, and,

Whereas, the party of the first part claims due it upon said shipments as shown by said monthly statements $82,765.80, and,

Whereas, the party of the second part through its board of Water Commissioners, duly and lawfully acting, claim

a rebate and the right to recover any excess, overcharge or illegal charge that may have been made or collected by the party of the first part from the party of the second part, and,

Whereas, said board has adopted the following resolution, to-wit:

"Resolved that the bill of the Anniston Pipe and Foundry Company be paid upon the execution of a valid agreement with the said company that such payment do not operate as a waiver of any right the city has in the premises to recover any excess, over charge or illegal charge collected by said company, and does not operate as an estoppel against the prosecution of any right the city may have in any court of law or equity."

Now, therefore, in consideration of the premises and in consideration of the payment of the said amount of $2,765.80, the party of the first part hereby accepts payment of the amount stated, upon the terms stipulated as hereinabove contained.

The intent and meaning of this agreement being that said payment shall in no way, manner or form effect the legal or equitable rights of the said party of the second part in the premises, and that said payment is made without prejudice to said rights on the part of either of the parties to this agreement.

Anniston Pipe & Foundry Company,
by J. K. Dimmick, V. P.

Attest: Jno. Pelham,
F. A. Stine.

This was all the evidence introduced pertinent or relating to the exceptions of defendant made on the hearing of this cause.

The court charged the jury as follows:

"Gentlemen of the Jury:

"As you are well informed, this is an action brought by the plaintiff, the City of Atlanta, against the defendants to recover damages alleged to have been suffered in consequence of the City of Atlanta having been compelled to pay in products purchased by it from these defendants an exorbitant or excessive price, over and above what it should have obtained the same product at in a fair market, where sales took place in a normal way, and open to free

competition. The defendants by their plea have denied any liability, and having done so, it is necessary for the plaintiff, in order to recover, to satisfy the jury by the fair weight of the evidence that it has sustained the damages alleged in the declaration, in whole, or in part at least, as a consequence of this unlawful combination, formed for the purpose of bringing up or putting up the price of this product. If the evidence has satisfied you, by the fair weight of it, and with reasonable certainty or reasonable approximation, what the damages are, then your verdict should be in favor of the plaintiff to the extent of the damage or injury thus suffered. If it does not so satisfy you, then your verdict should be for the defendants.

"Now, you have been just a week in the consideration of this case, and it has been developed before you by the introduction of the evidence and the argument by able counsel upon the evidence, all of which evidence, and the discussion of it by counsel constitutes a method provided by the law itself for settling controversises between people, and a method by which to enlighten the jury that they may do even-handed justice between the parties and this case be settled in court.

"As you know, the damages in this case are laid in the plaintiff's declaration at $17,431.10, and under such a declaration as that it is competent for, in an effort to do justice—if you find in favor of the plaintiff at all—to find in any sum, or fix it at any figure that the facts in your opinion, may warrant, up to the full amount sued for, or you may find it for one-third of it, or one-half if it, or one-fourth of it, or for whatever sum that you may consider the facts warrant it, you may find for a mere nominal sum, like one dollar, or five dollars, or any other trifling sum not equivalent to substantial damages. It is your duty to determine, first, whether the plaintiff is entitled to recover at all, and if entitled to recover, then fix the recovery at such sum as the entire body of the evidence—fairly looked at and fairly weighed by you—established.

"That is the measure of the right, and it would be the right that it would be the duty of the court and the jury to enforce.

"Now, besides the damages, the plaintiff sues for what the law calls a reasonable attorney's fee, and proof has been introduced in relation to that subject, tending to show that a reasonable attorneys fee would range from $2,500 or $3,000, up to $5,000. The right to recover an attorney's fee, of course, is incidental to the right to recover

substantial damages against the defendants and, when you have fully considered the case, if you do not find the plaintiff entitled to recover in the case any substantial damages, you could not allow an attorney's fee; but in case you do find substantial damages—and I mean substantial damages as distinguished from mere nominal damages, like one dollar or five dollars, in the event you do find in favor of the plaintiff for any sum of substantial damages, then the plaintiff would be entitled as a matter of law, of course, to a reasonable attorneys fee, which may be any sum that would afford plaintiff's counsel reasonable compensation for the labor done in the management of this law suit, this to be added to the actual damages, if any actual damages are recovered.

Now, you keep those propositions in your mind, because they are general propositions applicable to the case all along with which you deal.

"If, after you have considered the case—considered the whole of the evidence—you do not find by the fair weight of it that the plaintiff has suffered any damages at all, then your verdict should be for the defendants, and that would end the case without any more. If, when you have considered the evidence, you are satisfied that the plaintiff has suffered damages, but you are not able to say with approximate certainty, or reasonable certainty, what the damages are, then it would be your duty to find nominal damages, because there would be a violation of a right, and whenever a plaintiff has sustained a wrong by the violation of a contract, then he is entitled to recover as a matter of law at least nominal damages. When you come to substantial damages, it is the duty of the plaintiff to satisfy you, by a fair weight of the evidence, and with reasonable certainty, what the damages are, without your having to merely speculate or guess at what the damages are.

"Now, in this case, the suit proceeds as a ground of recovery upon the difference between what the plaintiff says that it could have purchased this cast iron pipe product for in the years 1895 and 1896, in open competition, in an open free market, and the price which it had to pay, in fact and did pay because of the prices having been forced up and fixed by this trust or combination. That now is the basis of this law suit. It is necessary, therefore, for the plaintiff to satisfy you, by a fair weight of the evidence, taken as a whole, that the price which it had to pay for this product was a price above what it could have

procured that product for in the market but for the existence of this unlawful combination, and satisfy you with reasonable certainty of the difference between the price it had to pay and what it ought to have paid, and that would constitute the measure of recovery. The Circuit Court of Appeals, speaking through Judge Lurton, in expressing the idea, says: "The difference between what he was thus compelled to pay, and the reasonable price of the commodity under natural, competitive conditions, would be an injury to that business directly resulting from such unlawful combination." So that your first inquiry is, what was the price paid for this cast iron product under these three contracts, one made in April, 1895; one in November, and one in March, 1896, and you may consider each contract separately, if the evidence shows a different state of facts, or that a different result should follow from each contract.

"Did the City of Atlanta pay beyond what was a fair and reasonable market price, such as would exist under natural conditions, and carried on according to the usual course of business?

If it did, how much more did it pay? To the extent of that difference, it has been damaged, and that is what it sues for.

If it did not pay beyond that, of course, it would suffer no damages, and is without right to recover in this case.

"Every man has a right to charge what is a reasonable and fair value for property when he sells it to a purchaser, and the purchaser is entitled to obtain it at a reasonable and fair price. That is justice, and that is the measure of right which the law confers on all parties.

"When you come to determine what is a reasonable price, the law furnishes certain standards that you may look to in determining that.

"The substantive right is one question, and the evidence by which it is established is another, but I shall put the case before you in such a way that you will not confuse them. The defendants had a right to sell their product at a reasonably fair and just price, and the plaintiff had a right to purchase it for that sum; that is the measure of right in the case.

When you come to make your inquiry into what is a reasonable and fair price for products, the law has furnished nothing to determine that; it is only its established market value that it has to go by, because it is presumed that people dealing in the market, according to the usual course of business, will not do so without a profit—that

they will not, as a regular thing, do so at a loss—hence, when the law undertakes to answer the inquiry as to what is a reasonable price, it looks to the established market price where there is any. The law says that is a reasonably fair price which every one may have a right to charge, and which every man must pay, so that, in this case, if you can see, by the fair weight of the evidence, that there was an established market price for products in kind, quality and quantity, substantially like this, that would be a standard furnished by the law for your guidance in determining what would be a reasonable price. If such a market price as that has been shown, and the plaintiff as a consequence of this unlawful combination was forced to pay a larger price than that market price, then that would constitute the measure of damages in this case, whether it was one dollar a ton, or two dollars a ton, or four or five or six. If no damage was sustained, if the fair market price was no more than the fair and reasonable value of the goods, looking to the cost of production, as well as the work and the like, if they were just the same, why, then of course, there would be no ground for recovery.

"I may say to you that the matter of existence of this unlawful combination is not a matter of dispute in this case. The defendants say there was no established market price; that the product was sold under contract, and on special orders, and by competitive bids, as in this case. They say that there is no market price fixed; that there is a special method of selling cast iron pipe, and that it is not sold as common, stock goods kept to be sold in job lots on the market like merchandise. Whether or not there is a market price is a question of fact which you must settle from the whole of the evidence. You have heard all that has been said on the subject, on both sides, and the reasons assigned by some of the witnesses as to why there could not be any fixed established market price for any product sold under competitive bids, in the way this was done.

"Now, if there was no established market price fixed by buying and selling, then the price at which the plaintiff would have a right to buy, and the defendants to sell, would be the fair and just value of it. You only reach that second inquiry provided you don't find that there was an established fair market price for it. If you do, you follow that. If you do not, why then you would proceed to determine what would be a fair price, and in doing that you may look at the cost of production, including the

cost of the original pig iron, and all of the material that goes into cast iron pipes, and the cost of selling it, and the freight to where it was sold, as in this case, the freight being prepaid, and when you do ascertain what would be a fair and reasonable and just price, then it would be your duty to determine whether or not there was a difference between that fair, reasonable and just price, and the price which the city was compelled to pay, and if there was a difference, then that would be the plaintiff's measure of damages sustained and would constitute the sum that you are to return into Court, that is, your verdict should be for that. To determine that now, you may look to the evidence introduced as to the conditions under which the material was sold, the terms of the contract under which it was sold; the testimony of these witnesses here before you; and the reasons that they assign, and see whether or not there was a fixed market price.

In determining, in the first place, whether there was an established, general market price for products substantially like this in kind, quality and quantity, sold under conditions like this, you will look to the whole of the evidence on both sides; you will look to any proof as to the prices the defendants sold goods, or quoted the price of goods in what is called free territory, that is, territory outside of these reserved cities, and the conditions under which they sold them, or quoted them, and determined whether or not those conditions were different substantially from the conditions under which they were furnished under this contract. If, under the contract, there was anything existed which demanded any particular quality or strength of pipe, owing to the test which was to be applied to it, or if there was any unusual responsibility attached to a party making such a contract or furnishing pipe to a city like Atlanta, as distinguished from selling it on the market, or at other places, why then you will take that into consideration in determining first, whether there was an established market price, and also in determining whether the price was reasonable.

"Now all of these are practicable questions of fact for the jury to deal with by the weight of the evidence. If there are conflicts in the evidence, why, you will say what evidence is entitled to the greater credit or the greater weight; and in determining that, you will look to the intelligence of the witnesses; their means of knowledge, and their motives to testify falsely or truly, as all of these things tend to strengthen or weaken their statements, and

from all of these matters draw your own conclusions as to which are entitled to credit and which ones are not.

"Now, there is a class of evidence which has been introduced before you, called expert evidence; witnesses who, in addition to stating facts, are permitted to give the jury an option about a proposition of fact, and who are allowed to do so upon the ground of their superior skill and judgment, and on the presumption that if they testify fairly they may enlighten the jury about matters more than an ordinary witness—in other words, that they may render the jury more aid than the ordinary class of witnesses may render. It is simply intended to aid the jury, and not to take the place of the jury's own reason, the jury's own judgment, as that is a duty which rests on you through the case; and that evidence is simply intended to furnish you light and to aid you in the discharge of your duty, and the expert evidence is, in that respect, like the common evidence, intended to aid, not to displace your own judgment, as it is your duty to reason about the facts coolly and justly.

"Now, another objection that is made by the defendants is that the plaintiff in this case, after it has made this contract, or at least when they had become aware of the existence of what is now complained of, this unlawful combination, and of the facts and circumstances connected with it, that they went along in full possession of all the knowledge that it now has, and that, notwithstanding that knowledge, without any investigation, the plaintiff went on with the contract, and insisted that the defendants should go along with it, and perform it, and that it has waived its right to complain about it, and is estopped from now claiming any damages on that score. Well, that is a nice close question, but I conclude that, as this particular suit is against the association, and not against the members of it, with which the City of Atlanta was dealing, and as the city's contract with that member has been declared by the courts to be a collateral matter, I have concluded that this doctrine does not apply, and that question does not here arise, and that eliminates that proposition from the case. So that the question that is left for you to determine is whether or not the plaintiff suffered any damages by reason or in consequence of this unlawful combination, in regard to whose existence there is no dispute, and that brings you to the question of whether or not it paid an excessive price for that product which it purchased during the years 1895 and 1896, or

any part of it, under either contract, and if so, the amount; and in determining that, you will inquire, as I have already stated to you, whether or not there was an established, fair market value for products sold substantially of the kind, quality and quantity of this and under conditions substantially like these. If there was such a market value, go by that, if there was not, then your inquiry will be what was the reasonable value of it; and when you come to that, you may look to the cost of the material that went into the product, and the cost of working it up, the shop cost, the selling cost, and the freight.

In determining whether or not there was a general, established market value, you may look at the markets in any particular territory; you may look to any prices or quotations or bids that may have been made to other places beyond the pay territory, and in free territory, and in that connection of course, you will take into consideration this question of freight rate, because that would cut a figure in determining the price at which the product might or ought to have been bought. If a concern in the City of Philadelphia was making bids or quotations on this work, you may look at the difference in the freight rate between a shipment from Philadelphia to Atlanta, and if it was shipped from Anniston, Chattanooga, South Pittsburg or any other nearer place where there was an advantageous freight rate. In short you will look at every fact and circumstance in this case, and apply your good reason to them.

"Now, by a general market price is meant—to give you the definition of it in the very language of the Supreme Court of the United States: 'The price at which the owner of the goods, or the producer, holds them for sale, the price at which they are freely offered in the market to all the world; such prices as dealers in the goods are willing to receive, and purchasers are made to pay, when the goods are bought and sold in the ordinary course of trade." That is a definition of a general, fair, market price.

"Now, whether there was such a market, or whether in consequence of these goods being sold under a special contract a market price could not apply, are questions of fact for the jury to determine.

"In considering every phase of the case, the jury will do so with a view to doing exact justice, as you would do between man and man, and not otherwise.

"When you have considered the whole case, if you find in favor of the defendants, why you will just say so, and

that would end the case. If you find in favor of the plaintiff, and that the plaintiff has sustained substantial damages, then it will be your duty to fix the actual damages and return that amount into Court. You have nothing to do with the trebling the amount, that is left to the Court. If you find for the plaintiff, and find anything beyond nominal damages, like one or five dollars, you will assess the amount, and fix what would be a reasonable attorney's fee in addition to the damages, but you should find them separately; find the damages so much, and then attorney's fee so much.

"Now, whether you find one way or another are questions about which the Court intimates no opinion, because they are questions of fact which belong exclusively to the province of the jury. I have only undertaken to aid you by such general instructions as will furnish you the rules under which you may decide these questions, and do justice between these parties. Now, take the case, and return such a verdict as you think the facts warrant. I am asked to give you this instruction, which I do:

"If the jury believe there was no regular market price, and undertakes to determine the reasonable value from the cost of production and they may include a reasonable profit to cost of production and freight."

"I think a person would be entitled to a reasonable or living profit over the actual cost of a thing to him. I think I have substantially given you that instruction before, but I will give it to you again."

Defendants requested the Court to instruct the jury as follows:

"If it appears that the pipe purchased by plaintiff from the Anniston Pipe Company was sold and delivered to plaintiff more than a year before this suit was brought, then, there would be no recovery in this case, because the cause of action would in that case be barred in one year under the statute of limitations of this state, limiting the right to bring such suits to one year."

This request the Court declined to give, and the defendant then and there excepted before the jury retired.

Defendants also requested the Court to charge as follows:

"If it appears that the pipe purchased by plaintiff was sold and delivered to it more than three years before this suit was brought then the plaintiff could not recover, because, under the statute of limitations of this state of three years, such suit would be barred."

The Court declined to give said instruction, and defendants then and there excepted before the jury retired.

Defendants tender this, their bill of exceptions, to the action of the Court in refusing defendants' request for instructions which is signed, sealed, and ordered to be made a part of the record in this cause.

C. D. Clark, Judge.

This Nov. 12th, 1904.

(Here follows "Grounds for New Trial by Defendants," Filed Dec. 5th, 1904.)

In the District Court of the United States for the Southern Division of the Eastern District of Tennessee.

City of Atlanta,

vs.

Chattanooga Foundry & Pipe Works and South Pittsburg Pipe Co.

The defendants come and assign the following grounds in support of their motion for a new trial heretofore entered in this cause:

1st. Because the Court erred in overruling the demurrer of said defendants to plaintiff's declaration.

2. Because the Court erred in sustaining plaintiff's demurrer to defendants' third plea, being the plea of the statute of limitations of the State of Tennessee of One Year, and their Fourth Plea being the plea of the Statute of Limitations of the State of Tennessee of Three Years.

3rd. Because the Court erred in refusing to instruct the jury as follows:

"If it appears that the pipe purchased by plaintiff from the Anniston Pipe Company was sold and delivered to plaintiff more than a year before this suit was brought, then there would be no recovery in this case because the cause of action would, in that case, be barred in one year under the Statute of Limitations of this State limiting the right to bring such suits to one year."

4th. Because the Court erred in refusing to instruct the jury as follows: "If it appears that the pipe purchased by plaintiff was sold and delivered to it more than three years before this suit was brought, then the plaintiff could not recover because, under the Statue of Limita-

tions of this State of three years, such suit would be barred."

Brown & Spurlock,
Attys. for Defendants.

(Here follows "Order overruling Plaintiff's motion for a new trial, filed Dec. 5th, 1904.)

In the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee.

City of Atlanta,

vs.

Chattanooga Foundry & Pipe Works, et al.

No. 647.

The plaintiff's motion for a new trial came on to be heard by the Court, and the Court being of opinion that the same is not well taken, the same is overruled and a new trial refused, to which action of the Court the plaintiff then and there excepted.

(Here follows "Order overruling defendant's motion for a new trial, filed December 5th, 1904.)

In the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee.

City of Atlanta,

vs.

Chattanooga Foundry & Pipe Works, et al.

No.

The defendant's motion for a new trial came on to be heard by the courts, and the Court being of opinion that the motion is not well taken the same is overruled and a new trial refused, to which action of the Court the defendant then and there excepted.

(Here follows petition for writ of error, filed Dec. 5th, 1904.)

In the District Court of the United States for the Southern Division of the Eastern District of Tennessee.

City of Atlanta,

vs.

Chattanooga Foundry & Pipe Works and South Pittsburg Pipe Co.

At Law.
Petition for Writ of Eror.

And now come the Chattanooga Foundry & Pipe Works and the South Pittsburg Pipe Company, defendants herein, and say that on or about the 14th day of October, 1904, this Court entered judgment herein in favor of plaintiff and against defendants, in which judgments, and proceedings had prior thereunto in the cause, certain errors were committed to the prejudice of these defendants, all of which will more in detail appear in the assignment of errors which is filed with this petition.

Therefore these defendants pray that a writ of error may issue in this behalf to the United States Circuit Court of Appeals for the Sixth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

Brown & Spurlock,
Attys. for Defendants.

Writ of error allowed,
This Dec. 5th, 1904. C. D. Clark, J.

(Here follows "Assignment of Errors," Filed Dec. 5th, 1904.)

In the District Court of the United States for the Southern Division of the Eastern District of Tennessee.

City of Atlanta,

vs.

The Chattanooga Foundry & Pipe Works and South Pittsburg Pipe Company.

The defendants in this action, in connection with the petition for writ of error, make the following assignment of errors, which they aver occurred upon the trial of the cause, and in the proceedings had prior thereto, to-wit:

1st. The Court erred on overruling defendants' demurrer to plaintiff's declaration, wherein they assigned the following grounds of defense. Each of said assignments being well taken:

(a) Because the fact alleged in plaintiff's declaration do not entitle them to recover the damages claimed under the Act of Congress passed July 2nd, 1900, entitled "An Act to protect trade and commerce against unlawful restraint and monopolies."

(b) Because the facts alleged are insufficient to entitle plaintiff to recover in this action.

(c) Because it is not alleged that plaintiffs were engaged in interstate commerce or trade at the time of the wrongs complained of.

(d) Because the wrongs and injuries suffered by plaintiffs are not the direct and immediate effect of the unlawful combination or restraint of trade complained of.

(e) Because it does not appear from the facts alleged, that plaintiff has suffered any damage in its business or property by reason of the contract or combination entered into between defendant and other pipe companies named in the declaration.

II. The Court erred in sustaining plaintiff's demurrer to defendant's third plea, being the plea of the statute of Limitations of the State of Tennessee of one year, because the suit was one for the collection of "Statutory Penalties."

III. Because the Court erred in sustaining plaintiff's demurrer to defendants fourth plea, being the plea of the statute of limitations of the State of Tennessee for three years, because said suit was one for injuries to plaintiff's property or business inflicted by the tort or wrongs of defendants.

IV. Because the Court erred in refusing to instruct the jury as follows:

"If it appears that the pipe purchased by plaintiff from the Anniston Pipe Company was sold and delivered to plaintiff more than a year before this suit was brought, then there would be no recovery in this case because the cause of action would in that case be barred in one year under the statute of limitations of this state limiting the right to bring such suits to one year."

V. Because the Court erred in refusing to instruct the jury as follows:

"If it appears that the pipe purchased by plaintiff was sold and delivered to it more than three years before this suit was brought, then the plaintiff could not recover because, under the statute of limitations of this state for three years, such suit would be barred."

Brown and Spurlock,
Attorneys for Defendants.

(Here follows "Bond on Writ of Error" Filed Dec. 5th, 1904.)

Know all men by these presents, that we, Chattanooga Foundry & Pipe Works & South Pittsburg Pipe Company, as principal and Brown and Spurlock as sureties and held and firmly bound unto The City of Atlanta in the full and just sum of Five hundred Dollars to be paid to the said City of Atlanta certain attorneys, executors, administrators or assigns; to which payment well and truly to be made, we bond ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 5th, day of December in the year of our Lord one thousand nine hundred and four.

Whereas, lately at a Circuit Court of the United States for the Eastern District of Tennessee in a suit depending in said Court, between city of Atlanta and Chattanooga Foundry & Pipe Works and South Pittsburg Pipe Company a decree was rendered against the said Chattanooga Foundry & Pipe Works and South Pittsburg Pipe Company and the said Chattanooga Foundry & Pipe Works and South Pittsburg Pipe Company having obtained an allowance of a writ of error to reverse the decree in the aforesaid suit, and a citation directed to the said City of Atlanta citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit to be holden at the City of Cincinnati, in said Circuit, on the 3rd, day of January next.

Now the condition of the above obligation is such, that if the said Chattanooga Foundry & Pipe Works and South Pittsburg Pipe Company shall prosecute Appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—
Jno. D. Key.

Chatta. Foundry & Pipe Wks.
South Pittsburg Pipe Company,
By Brown & Spurlock, Attys.
Brown & Spurlock.

C. D. Clark, J. Approved by—

Writ of Error.

United States Circuit Court of Appeals for the Sixth Circuit.

The United States of America, Sixth Judicial Circuit, ss:

The President of the United States:

To the Honorable Judges of the Circuit Court of the United States for the Eastern District of Tennessee—Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Circuit Court, before you, between City of Atlanta, plaintiff, and Chattanooga Foundry & Pipe Works, and South Pittsburg Pipe Company, defendants, a manifest error hath happened, to the great damage of the Chattanooga Foundry & Pipe Works, and South Pittsburg Pipe Company, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that you under your seal, distinctly and openly, you send the record and proceeding aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at Cincinnati, in said Circuit, on the 3rd day of January next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 5th day of December, in the year of our Lord, one thousand nine hundred and four, and of the independence of the United States of America the one hundred and twenty-ninth.

(Seal.) Jno. D. Key,
Deputy Clerk, of the Circuit Court of the United States, Eastern District of Tennessee.

Allowed:
C. D. Clark, Judge.

No. 647. In the U. S. Circuit Court at Chattanooga, City of Atlanta vs. Chatta. Foundry & Pipe Works. Writ of Error. Filed at — O'clock — M. Dec. 4, 1904. Henry O. Ewing, Clerk.

United States Circuit Court of Appeals for the Sixth Circuit.

United States of America, Sixth Judicial Circuit, ss:

To City of Atlanta—Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said Circuit, on the* 3rd day of January next, pursuant to a Writ of Error, filed in the Clerk's Office of the Circuit Court of the United States for the Eastern District of Tennessee, wherein Chattanooga Foundry & Pipe Works and South Pittsburg Pipe Company are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 5th day of December, in the year of our Lord one thousand nine hundred and four, and of the Independence of the United States of America the one hundred and twenty-nine.

C. D. Clark, Judge.

*Not exceeding 30 days from the day of signing.

We acknowledge service of this notice this Dec. 5, 1904.

Westmoreland Bros.,
C. P. Goree,
L. A. Dean, &
J. L. Foust,
Attorneys for City of Atlanta.

No. 647. In the U. S. Circuit Court at Chattanooga, City of Atlanta against Chatta. Foundry & Pipe Works. Citation. Filed at — o'clock — M. Dec. 5, 1904. Henry O. Ewing, Clerk.

(Here follows "Order extending time for filing transcript" filed January 3rd, 1904.)

City of Atlanta,

vs.

Chattanooga Foundry & Pipe Works, et al.

No. 647.

In this cause for satisfactory reasons appearing the time for filing the transcript in the United States Circuit Court of Appeals at Cincinnati is extended thirty days.

Enter this,

Clark, Judge.

(Here follows "Order extending time for filing transcript," filed February 2nd, 1905.)

City of Atlanta,

vs.

Chattanooga Foundry & Pipe Works and South Pittsburg Pipe Company.

No. 647.

For satisfactory reasons appearing to the Court it is hereby ordered that the time for filing the transcript in the United States Circuit Court of Appeals at Cincinnati be extended thirty days.

Enter this,

Clark, Judge.

The United States of America, Eastern District of Tennessee, Southern Division, ss:

I, Henry O. Ewing, Clerk of the Circuit Court of the United States, within and for the District aforesaid, do hereby certify that the foregoing is a full, true and perfect transcript of the record, excepting such parts as were omitted by agreement of counsel, in the case of City of Atlanta, vs. Chattanooga Foundry & Pipe Company et al, No. 647, as the same appears on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at the City of Chattanooga, Tennessee this —— day of Feb. A. D. 1905.

(Seal.) Henry O. Ewing, Clerk.

By Jno. D. Key, Deputy Clerk.

And afterwards to wit on February 27th, 1905, præcipe for appearance of counsel was filed which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

CHATTANOOGA FOUNDRY & PIPE WORKS and SOUTH Pittsburg Pipe Company
vs.
CITY OF ATLANTA. } No. 1403.

Frank O. Loveland, clerk of said court:

Please enter my appearance as counsel for the appellants.

FOSTER V. BROWN.
FRANK SPURLOCK.

And afterwards to wit on April 1st, 1905, a motion to dismiss was filed clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth District, April Term, 1905.

CHATTANOOGA FOUNDRY & PIPE WORKS and SOUTH Pittsburg Pipe Works, Plaintiffs in Error,
vs.
CITY OF ATLANTA, Defendant in Error. } No. 1403.

And now comes the defendant in error in the above stated cause and moves this honorable court to dismiss plaintiffs' writ of error herein upon the following grounds:

1. Because it appears from the printed record in this cause that the court below overruled defendants' demurrer to plaintiff's declaration, on the 16th day of August, 1901, (Printed Record 25) upon which action of the court plaintiffs in error assign error (first assignment of error Printed Record 85) and more than three years thereafter seek to have this court review and reverse the action of the court below in overruling said demurrer.

Wherefore, this court is without jurisdiction to hear and determine said assignment of error.

2. Because it appears from the printed record that the court below sustained plaintiff's demurrer to defendants' third plea, that plaintiff's action accrued more than one year before the suit was brought, and struck out said plea, October 7th, 1901, (Printed Record 32) to which action of the court no exception was taken, and upon which said second assignment of error is based.

Wherefore, this court is without jurisdiction to hear and determine said second assignment of error; more than three years having elapsed from the rendition of said judgment sustaining said demurrer and striking said plea before suing out this writ of error in this cause.

3. Because it appears from the printed record in this cause that the court below sustained plaintiff's demurrer to defendants' fourth plea of the statute of three years, and struck out said plea on the 6th day of October, 1904, (Printed Record 44), and upon which action of the court, which was unexcepted to, plaintiffs in error assign error as set out in the third assignment of error (Printed Record 85).

The action of the court below in sustaining said demurrer and in striking out said fourth plea, being unexcepted to by the defendants in the court below, this court is without jurisdiction to hear and determine said third assignment of error.

4. Because it appears from the printed record that after the trial of said cause, on the day following said trial, an order was entered in said cause, allowing the defendants to amend the order of the court below, in which said demurrer to defendants' third and fourth pleas was sustained and in which said pleas were stricken, so as to reserve exceptions to said order (Printed Record 46), and that plaintiff in the court below had no notice of said amendment or application therefor.

Wherefore, the court below was without authority to pass said order amending the order entered on the 13th day of October, 1903, but in fact passed on the 6th day of October, 1904 (Printed Record 44). And it nowhere appears in said record that said order was so amended.

5. Because it appears from the printed record in this cause that the requests to charge the jury as set out in the fourth and fifth assignments of error (Printed Record 85 and 86) as to statute of limitations of one and three years, are expressly covered by the demurrer and pleas referred to in said second and third assignments of error (Printed Record 85); and that the principles of law embraced in said requests to charge the jury were adjudicated by the court in sustaining said demurrer and striking said pleas, to which said action of the court defendants did not except.

Wherefore, the question raised by said fourth and fifth assigments of error (Printed Record 85) were *res adjudicata*, when the court below refused to give said requests to the jury October 14th, 1904 (Printed Record 44).

6. Because it appears from the motion for a new trial made in this cause (Printed Record 45), and the ground assigned in support of same (Printed Record 82), that no reasons are assigned why a new trial should be granted, except such as were raised by the pleadings and decided thereon.

7. Because it appears from the bill of exceptions in the printed record, that said bill of exceptions does not contain all of the evidence introduced before the jury on the trial of said cause. Bill of exceptions. Printed Record 73.

Wherefore, upon consideration of the foregoing grounds defendant in error says that there is nothing before this court, raised by said

assignment of errors, for its consideration and determination, and defendant prays judgment of the court.

WESTMORELAND BROS.,
L. A. DEAN,
J. L. FOUST, &
C. P. GOREE,
Attorneys for Defendant in Error.

I, C. P. Goree, of counsel for the defendant in error, do certify that in my opinion the foregoing motion is well founded in law.

C. P. GOREE,
Of Counsel for Def't in Error.

March 30th, 1905.

And afterwards to wit on June 14, 1905, judgment was entered in said cause clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

CHATTANOOGA FOUNDRY & PIPE WORKS ET AL.
vs.
CITY OF ATLANTA. } No. 1403.

Error to the Circuit Court of the United States for the Eastern District of Tennessee.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgement of the said circuit court, in this cause be and the same is hereby affirmed with costs.

And afterwards to wit on July 10th 1905, petition for writ of error was filed which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

CHATTANOOGA FOUNDRY & PIPE WORKS and South Pittsburg Pipe Co., Plaintiffs in Error,
vs.
CITY OF ATLANTA, Defendant in Error. } At Law. Petition for Writ of Error.

And now come The Chattanooga Foundry & Pipe Works and The South Pittsburg Pipe Company, defendants herein, and say that on or about the 14th day of June, 1905, this court entered judgment herein in favor of the plaintiff against these defendants, in which judgment, and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of these defendants,

all of which will more in detail appear from the assignment of errors which is filed with this petition.

Therefore these defendants pray that a writ of error may issue in this behalf to the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause duly authenticated, may be sent to the Supreme Court of the United States.

FOSTER V. BROWN,
FRANK SPURLOCK,
Attorneys for Defendants.

And towit on the same day July 10th, 1905, assignments of error were filed in said cause clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

CHATTANOOGA FOUNDRY & PIPE WORKS and South Pittsburg Pipe Co., Plaintiffs in Error, vs. CITY OF ATLANTA, Defendant in Error.	At Law. Assignments of Error.

The Chattanooga Foundry & Pipe Works and South Pittsburg Pipe Company, defendants in this action, in connection with their petition for writ of error, make the following assignments of error, which they aver occurred at the trial of this cause, and in the proceedings had prior thereto.

I. The court erred in affirming the action of the circuit court in overruling defendants' demurrer to plaintiff's declaration:

(*a.*) Because the facts alleged in the declaration did not entitle plaintiff to recover the damages claimed under the act of Congress passed July 2, 1890, entitled "An act to protect trades and commerce against unlawful restraints and monopolies:"

(*b.*) Because it is not alleged that the *plaintiffs* were engaged in interstate commerce or trade at the time of the wrongs complained of:

(*c.*) Because the wrongs and injuries suffered by plaintiff were not the direct and immediate effect of the unlawful combination or restraint of trade complained of:

(*d.*) Because it does not appear from the facts alleged that the plaintiff has suffered any damage in its business or property by reason of the contract or combination entered into between defendants and the other pipe companies named in the declaration

II. The court erred in affirming the action of the circuit court in sustaining plaintiff's demurrer to defendants' third plea, being the plea of the statute of limitations of the State of Tennessee of one year, because the suit was one for the collection of "statutory penalties."

III. Because the court erred in affirming the circuit court in sus-

taining plaintiff's demurrer to defendants' fourth plea, being the plea of the statute of limitations of the State of Tennessee for three years because said suit was one for injuries to plaintiff's property or business inflicted by the tort or wrongs of defendants.

IV. Because the court erred in affirming the action of the circuit court in refusing to instruct the jury as follows:

"If it appears that the pipe purchased by plaintiff from the Anniston Pipe Company was sold and delivered to plaintiff more than a year before this suit was brought, then there would be no recovery in this case because the cause of action would in that case be barred in one year under the statute of limitations of this State limiting the right to bring such suits to one year."

V. Because the court erred in affirming the action of the circuit court in refusing to instruct the jury as follows:

"If it appears that the pipe purchased by plaintiff was sold and delivered to it more than three years before this suit was brought, then the plaintiff could not recover because, under the statute of limitations of this State for three years, such suit would be barred."

For these errors defendants pray that said judgment be reversed.

FOSTER V. BROWN,
FRANK SPURLOCK,
Attorneys for Defendants.

And afterwards to wit on July 17th, 1905, an order allowing writ of error prayed for was entered which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

CHATTANOOGA FOUNDRY & PIPE WORKS
vs.
CITY OF ATLANTA. } No. 1403.

It is hereby ordered that the writ of error prayed for herein is allowed and bond is fixed in the sum of ten thousand ($10,000.00) dollars.

HORACE H. LURTON,
United States Circuit Judge.

Mackinac Island, Mich., July 17th, 1905.

And on the same day towit July 10th, 1905 bond in the sum of ten thousand dollars was given which reads and is as follows:

Bond on Writ of Error or Appeal.

Know all men by these presents, that we, Chattanooga Foundry & Pipe Works, and South Pittsburg Pipe Company, as principal, and Foster V. Brown, Frank Spurlock and M. M. Allison, as sureties, are held and firmly bound unto City of Atlanta, a municipal corporation in the State of Georgia in the full and just sum of ten

thousand ($10,000.00) dollars to be paid to the said City of Atlanta, its attorneys, agents or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 7th day of July in the year of our Lord one thousand nine hundred and five.

Whereas, lately in the United States circuit court of appeals for the sixth circuit in the above stated suit between said Chattanooga Foundry & Pipe Works and The South Pittsburg Pipe Company, plaintiffs in error and the said City of Atlanta, defendant in error judgment was rendered in favor of said defendant in error and judgment against said plaintiffs in error, and said plaintiffs in error having prayed and obtained an allowance of a writ of error to the Supreme Court of the United States to reverse said judgment in the aforesaid suit and a citation having been directed to the City of Atlanta citing and admonishing it to be and appear at a session of the Supreme Court of the United States, to be holden at the city of Washington, District of Columbia, on the ninth day of October next.

Now, therefore, the condition of the above obligation is such, that if the above named Chattanooga Foundry & Pipe Works and South Pittsburg Pipe Company shall prosecute their writ of error to effect, and answer all damages and costs and pay off and discharge whatever judgment may be awarded against them if they fail to make — plea good, then the above obligation to be void; else to remain in full force and virtue.

CHATTANOOGA FOUNDRY & PIPE W'KS. [SEAL.]
BROWN & SPURLOCK, Att'ys. [SEAL.]
SOUTH PITTSBURG PIPE CO., [SEAL.]
By FRANK SPURLOCK, Att'y.
FRANK SPURLOCK.
FOSTER V. BROWN.
M. M. ALLISON.

Sealed and delivered in presence of—
Attest: J. L. FOUST.

We are satisfied with the foregoing bond and the sureties thereon.
J. L. FOUST,
For Plaintiffs.

[Endorsed:] Bond on writ of error or appeal to the United States circuit court of appeals for the sixth circuit. Filed July 10 1905. Frank O. Loveland clerk.

And afterwards towit on July 17th writ of error was signed and citation issued which are in words and figures as follows:

THE UNITED STATES OF AMERICA:

Supreme Court of the United States.

The President of the United States to the honorable judges of the United States circuit court of appeals for the sixth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said United States circuit court of appeals for the sixth circuit, before you, or some of you, between City of Atlanta, plaintiff, and Chattanooga Foundry & Pipe Works and South Pittsburg Pipe Company, defendants, a manifest error hath happened, to the great damage of the said Chattanooga Foundry & Pipe Works and South Pittsburg Pipe Company, defendants, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 17 day of August, 1905, in said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the said Supreme Court, the 17th day of July, in the year of our Lord, 1905.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

B. K. COWEN,
Clerk of the Circuit Court for the
Southern District of Ohio.

Approved by
HORACE H. LURTON,
Circuit Judge.

The Supreme Court of the United States.

THE UNITED STATES OF AMERICA:

Supreme Court of the United States.

To City of Atlanta, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington on the 17 day of August next, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the sixth circuit, wherein The Chattanooga Foundry &

Pipe Works and South Pittsburg Pipe Company are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this the 17th day of July, in the year of our Lord, one thousand nine hundred and five.

HORACE H. LURTON,
U. S. Circuit Judge.

I hereby, this 17 day of July, 1905, accept due personal service of this citation on behalf of City of Atlanta, the defendant in error.

J. L. FOUST,
Att'y for Defendant in Error.

United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of Chattanooga Foundry & Pipe Works *et al. vs.* City of Atlanta, No. 1403, as the same remains upon the files and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said court, at the city of Cincinnati, Ohio, this 18th day of July, A. D. 1905.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals
for the Sixth Circuit.

Endorsed on cover: File No. 19,867. U. S. circuit court appeals, 6th circuit. Term No. 365. Chattanooga Foundry & Pipe Works and South Pittsburg Pipe Company, plaintiffs in error, *vs.* City of Atlanta. Filed August 3d, 1905. File No. 19,867.

FILE COPY

Office Supreme Court U. S.
FILED
MAR 14 1906
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1905

No. [redacted]94

CHATTANOOGA FOUNDRY AND PIPE WORKS AND SOUTH PITTSBURG PIPE COMPANY, PLANTIFFS IN ERROR,

vs.

CITY OF ATLANTA

Assignment of Errors and Brief for Plaintiff in Error

FOSTER V. BROWN,
FRANK SPURLOCK,
Attorneys.

No. 365.

IN THE SUPREME COURT OF THE UNITED STATES,

October Term, 1905.

CHATTANOOGA FOUNDRY & PIPE WORKS AND SOUTH PITTSBURG PIPE COMPANY,

Complainants in Error,

vs.

CITY OF ATLANTA,

Defendant in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

ASSIGNMENT OF ERRORS AND BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE

This is a suit to recover three-fold damages under Section 7 of the Anti-trust Act.

The defendant in error, the plaintiff below, alleged in its declaration that it was a municipal corporation under the laws of Georgia, and complained of the Chattanooga Pipe & Foundry Company and South Pittsburg Pipe Works "in an action to its damage in the sum of $50,000." The cause of action, as stated, was in substance as follows: That the two defendants named, who were engaged in the business of manufacturing and selling cast iron pipe and fittings, did on or about the 28th day of December, 1894, enter into a contract or combination in the form of a trust or conspiracy in restraint of trade or commerce in and between certain states and territories named, with other corporations engaged in a similar

business, one of them being the Anniston Pipe & Foundry Company.

That said contract or conspiracy was "in relation to the manufacture and sale of cast-iron pipe and fittings, which said confederacy and unlawful conspiracy was entered into, as aforesaid, in violation of the law and in defiance of the same, and was formed by the defendants and their associates for the purpose of defrauding their customers in the purchase and use of the pipe and fittings manufactured by them; the defendants and their said associates carrying on their said unlawful confederacy and conspiracy under the name and style of the 'Associated Pipe Works,' the same being composed of the defendants and their said associates, and that by reason of said unlawful combination and conspiracy, as aforesaid, the defendants and their associates intended and proposed to destroy, and did destroy competition among themselves as to any work done and pipe and fittings furnished consumers in any of the states and territories mentioned, and to make effectual this purpose it was agreed by defendants, and their associates, that upon all work done in said States and territories a 'bonus' should be charged on every ton of pipe and every pound of fittings sold by them, or either of them, to be determined by the amount the combination could force the customer to pay," and that by reason of said unlawful combination the Anniston Pipe & Foundry Company had under three several contracts sold and shipped to the plaintiff the cast iron pipe and fittings as shown on three exhibits attached to the declaration marked A, B and C.

That between April 5, 1895, and October 22, 1895, the pipe and fittings covered by Exhibit "A" amounted in the aggregate to $8,386.78 at $21.00 and $22.00 per ton for pipe, and 2⅛, 2½ and 2¾ cents per pound for fittings, the pipe at said time being worth f. o. b. cars at Atlanta, Ga., only $17.25 per ton, and the fittings only 2 cents per pound.

That between November 12, 1895, and December 30, 1895, the pipe and fittings covered by Exhibit "B" was sold and delivered, and aggregated $36,779.78 at $22.00 per ton for pipe and 2½ and 3 cents per pound for fittings, the said pipe being worth on said dates only $17.25 per ton and the fittings only 2 cents per pound, both f. o. b. cars at Atlanta.

That from January 9, 1896, to January 30, 1897, the pipe covered by Exhibit "C" was sold and delivered and aggregated $11,-

569.36 at $21.00, $22.00 and $22.75 per ton for pipe, and 2¼ and 2½ cents per pound for fittings, the said pipe being worth on said dates only $17.25 per ton and fittings only 2 cents per pound.

That the "defendants and their associates did, unlawfully, for the purpose of carrying out said unlawful combination, make and offer fraudulent bids, which were well understood among themselves and not known to plaintiff; the said Anniston Pipe & Foundry Company in each instance putting in the lowest bid for the contract of furnishing said pipe and fittings, and the defendants and their other associates making and offering in each instance bids always higher and larger than those offered by the Anniston Pipe & Foundry Company, and the defendants and their associates did participate with said Anniston Pipe & Foundry Company in the 'bonus' made by said fraudulent sale, made as aforesaid, with said defendants, and their said associates, by reason of said fraudulent combination, and said fraudulent sales to plaintiff as aforesaid, did defraud the plaintiff out of the sum of $15,000.00 in violation of the Act of Congress of July 2, 1890, which, together with the true worth of said pipe and fittings, as aforesaid, paid to the said Anniston Pipe & Foundry Company by the plaintiff, aggregating the sum of $56,736.12, as fully shown, set out and itemized in said Exhibits A, B and C."

That "plaintiff was injured in its property by the defendants and their confederates by reason of the unlawful acts and deeds aforesaid," forbidden by said Act of Congress, wherefore plaintiff was entitled to recover the sum of $45,000.00, "being three-fold the damages by it sustained by reason of said unlawful conduct as aforesaid as provided by the Act of Congress of the United States of July 2, 1890, and for $5,000.00 as a reasonable Attorneys' fee." (Rec. 3-6.)

By a subsequent amendment it was averred that "plaintiff was injured by the defendants and their confederates by reason of the unlawful acts and deeds as before alleged in the like sum of $15,000.00, in its business of conducting a system of water works in Fulton County, Georgia, in furnishing water to its customers and patrons for certain stipulated compensation, from which business plaintiff received large incomes which went into the city treasury, said unlawful acts and deeds being in violation" of the said Act of Congress; and that by reason of said unlawful acts and deeds "it was injured and damaged in its property in said sum of $15,000.00." (Rec. 34.)

By another amendment the various items of pipe and fittings sold were re-stated and the total amount of overcharge fixed at $17,431.10 as the sum to be multiplied in arriving at the treble damages claimed. (Rec. 37-38.)

To this declaration the defendants demurred and assigned the following causes:

(1)

Because the facts alleged in plaintiff's declaration do not entitle it to recover damages claimed, under the Act of Congress passed July 2nd, 1900, entitled "An act to protect trade and commerce against unlawful restraint and monopolies."

(2)

Because the facts alleged are insufficient to entitle plaintiff to recover in this action.

(3)

Because it is not alleged that plaintiff was engaged in interstate commerce or trade at the time of the wrongs complained of.

(4)

Because the wrongs and injuries suffered by plaintiff are not the direct and immediate effect of the unlawful combination or restraint of trade complained of.

(5)

Because it does not appear from the facts alleged that plaintiff has suffered any damage in its business or property by reason of the contract or combination entered into between defendants and other pipe companies named in the declaration. (Rec. 26.)

This demurrer was overruled, to which action of the Court the defendants excepted. (Rec. 25.)

The defendants also pleaded "that the plaintiff's action accrued more than one year before the suit was brought."

And also by another plea "that plaintiff's action accrued more than three years before the suit was brought." (Rec. 26 and 43.)

The plaintiff demurred to each of said pleas of the statute of limitations because the said statutes did not apply to nor operate against the plaintiff's suit. (Rec. 17.)

The Circuit Court sustained the demurrer to the plea of one year, but overruled the demurrer to the plea of the statute of three years. (Rec. 18.) On error from the United States Circuit Court

of Appeals for the Sixth Circuit the judgment of the Circuit Court in holding that the action of plaintiff was barred by the statute of limitation of the State of Tennessee of three years was reversed and the cause remanded for a new trial, whereupon the Circuit Court sustained the demurrer of plaintiff to both pleas of the statute of limitations, to which action of the Court the defendant excepted. (Rec. 35, 44, 46.) The case then went to trial before a jury.

EVIDENCE

It was admitted on the trial that at the time the Anniston Pipe & Foundry Company made the several contracts for the sale of pipe to the city of Atlanta, there was a combination in restraint of trade existing between that corporation and the several others named in the declaration, including the two defendants to the suit; the evidence of the combination and its character being the same as that produced in behalf of the United States in the cause wherein said combination was declared illegal and void.

Addyston Pipe & Steel Co., et als. vs. The United States, 175 U. S., 211. (Rec. 50.)

The pipe sold and delivered by the Anniston Company was all covered by three contracts. The first was let to the lowest bidder in April, 1895, for that year's supply; the second on the 6th day of November, 1895, for the purpose of building a duplicate main; and the third was let to the lowest bidder on March 4, 1896, for that year's supply.

The evidence tended to show that the contract made with the Anniston Company on November 6, 1895, was made at a time when the city was not authorized to contract, but was entered into on account of an emergency caused by a break in one of its large water mains, the price for this pipe being that proposed by the city and accepted by the Anniston Company. This contract fixed the price of pipe at $22.00, which was to be delivered in such quantities and at such times as deemed necessary during the year 1895, the delivery to begin immediately and to be continued as rapidly as needed, not to exceed twenty-four pieces per day. To secure the payment of this pipe it was provided that title should remain in the Anniston Company with the right on its part to remove it if necessary. And it was further recited that the contract on the part of the City was made for the public good and safety which

required the laying of the water main for which it was to be used. (Rec. 69-70.)

The evidence tended to show further that in May, 1896, the officials of the City of Atlanta were furnished with copies of the minutes of the Pipe Association, together with all the letters and telegrams which were then in the hands of J. E. McClure, who exhibited the same to a committee appointed for the purpose of investigating the existence of the combination. That on June 2, 1896, at a meeting of the Board of Water Commissioners, a resolution was passed demanding that the Anniston Company continue the delivery of pipe under its contract for that year. The evidence showed further that on the 19th day of September, 1896, there was then a balance due the Anniston Company which was paid to it under a separate agreement that the payment was not to operate as a waiver of any claim for overcharges, or to prejudice the rights of either party to the agreement. (Rec. 72-3.)

The defendants requested the Court to charge as follows:

"If it appears that the pipe purchased by plaintiff from the Anniston Pipe Company was sold and delivered to plaintiff more than a year before this suit was brought, then, there could be no recovery in this case, because the cause of action would in that case be barred in one year under the statute of limitations of this state, limiting the right to bring such suits to one year."

And also requested the Court to charge as follows:

"If it appears that the pipe purchased by plaintiff was sold and delivered to it more than three years before this suit was brought, then the plaintiff could not recover, because, under the statute of limitations of this state of three years, such suit would be barred."

To the refusal of the Court so to charge the defendant duly excepted. (Rec. 81.)

A verdict was returned in favor of plaintiff for $1,500.00 damages and $2,500.00 attorneys' fees. On this verdict the following judgment was rendered:

"And thereupon, on motion of plaintiff's attorneys, and it appearing to the court that this is a suit under Section 7 of the Acts of Congress, commonly called the Anti-trust Act; it is ordered and adjudged by the Court that the plaintiff's damage be trebled, pursuant to the provisions of said act, making in the aggregate when so

trebled, the sum of forty-five hundred ($4,500) dollars, and which, together with the attorneys' fees of twenty-five hundred ($2,500) dollars, makes a total aggregate of seven thousand ($7,000) dollars." (Rec. 45.)

From the judgment aforesaid defendant sued out a writ of error to the Circuit Court of Appeals for the Sixth Circuit, and that Court affirmed the judgment of the Circuit Court, whereupon the case was brought to this Court.

ASSIGNMENT OF ERRORS

The plaintiff in error now assigns and relies upon the following errors in the action of the Court below:

I.

The Court erred in not holding that the cause of action was barred by the statute of limitations of the State of Tennessee, providing that actions for statute penalties should be commenced within one year after the cause of action accrued.

II.

The Court erred in not holding that the suit was barred by the statute of limitations of Tennessee providing for the commencement of "actions for injuries to personal or real property; actions for the detention or conversion of personal property, within three years from the accruing of the cause of action."

III.

The Court erred in not sustaining the demurrer to the declaration (a) because the facts alleged in the declaration did not entitle defendant in error to recover the damages claimed under the Act of Congress passed July 2, 1890; (b) because the injuries sustained by the defendant in error were not the direct and immediate effect of the unlawful combination or restraint of trade complained of; (c) because from the facts alleged defendant in error suffered no damage in its business or property by reason of the alleged contract or combination set forth in the declaration.

These errors were duly assigned, both to the action of the Circuit Court (Rec. 85-6) and to the action of the United States Circuit Court of Appeals for the Sixth Circuit. (Rec. 93-4.)

BRIEF

HAS THE DEFENDANT IN ERROR ANY CAUSE OF ACTION UNDER THE ANTI-TRUST ACT?

We respectfully insist that it has not and that the demurrer to the declaration should have been sustained.

It is alleged in the declaration that the defendant in error owned and operated its own system of water works and supplied itself and inhabitants with all the water they used for public and private purposes; that to obtain cast iron pipe and fittings to be used in these works, it made three several contracts with the Anniston Pipe Company, in which it agreed to pay more for the pipe than it was reasonably worth, and the difference is stated between the cost and fair value under each contract, the aggregate difference being alleged as the measure of damages sued for. The right to recover this difference between the price paid under the several contracts, and the actual worth of the pipe and fittings delivered under each, is based upon the allegation that previous to the time of making these contracts the Anniston Company and the two plaintiffs in error, with three others engaged in similar business, had entered into an unlawful contract in restraint of interstate commerce, of which the defendant in eror was ignorant; and that it was induced to let the contracts to the Anniston Company by the fraudulent action of plaintiffs in error in making higher and fictitious bids for the contracts. The Anniston Company was not sued, and by trebling the excess in price paid to it, the plaintiffs in error were called upon for an amount of damages greater than the total original cost of all of the pipe and fittings furnished to the defendant in error.

While the declaration alleges that the defendant in error was injured in its business of supplying water to its inhabitants, the averment can only mean that it was injured by the payment of an excessive price for the pipe bought to extend its water mains. There is no allegation showing an injury of any other character either to the business or property of the defendant in error. The action can only be maintained, if at all, on the ground that the defendant in error, as a consumer, has been compelled to pay more for the goods it purchased by reason of the fact that the seller was

a party to an illegal contract in restraint of trade, and that it has in this manner been injured in its business and property within the meaning of the Act of Congress.

By the terms of the Act of July 2, 1890, "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States," * * * * is declared illegal; and "every person who shall make any contract, or engage in any such combination or conspiracy," is guilty of a misdemeanor and subject to heavy fine. And "every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monoplize any part of the trade or commerce among the several States," shall also be guilty of a misdemeanor, and subject to like fine.

By Section 7 it is provided "any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act may sue therefor, * * * * and shall recover three-fold the damages by him sustained and the costs of suit, including a reasonable attorney's fee."

Considered in connection with the nature of the evil which the Act was intended to remedy, the language of the Seventh Section indicates plainly a limitel class of cases to which it applies. The main purpose of every monopoly and of every contract, combination or conspiracy in restraint of trade is the destruction of competition. Of course the enhancement of prices is the ultimate aim, but the ability of the combination to raise prices depends upon its success in ridding its field of trade of competitors. This done, it is in position to control the supply of the commodity in which it deals, and to dictate the prices and terms upon which it will sell. Competition is destroyed by two steps in the same direction: In the first place, the articles of agreement or association restrain the parties thereto from competing with each other; and in the next place the combination or association thus formed would, if unrestrained by law, in divers illegal ways injure or destroy the business of those traders who have not become parties to the agreement.

We cite below a few out of the very numerous class of cases involving the right of rivals in trade to recover damages for injuries inflicted upon their business by combinations to restrain or monopolize local trade:

Brown & Allen v. Jacobs' Pharmacy, 115 Ga., 429, in which the plaintiffs were retail druggists who had been prevented by the

defendant association from obtaining the supplies necessary to the successful operation of their business.

Boutwell v. Marr, 71 Vermont, 1, in which the plaintiff was engaged in the business of dressing and polishing granite, and was prevented by the defendant association from purchasing the material necessary for the successful operation of his business.

Doremus v. Hennessy, 176 Ill., 608, in which the plaintiff was a laundress who was injured in her business by the threats, intimidation, false representations and unlawful inducements which caused parties who were doing her work to quit the same.

A case of the same character was Mogul S. S. Co. v. McGregor, L. R. 15 Q. B. Div. 476; 21 Q. B. D. 544; 23 Q. B. D. 598.

From the nature and purpose of a combination to restrain and monopolize trade, and as shown by numerous cases of the character cited, it was reasonably to be expected that every contract, combination or conspiracy to restrain trade or to monopolize the same would include among its purposes that of an assault upon the business of independent rival traders. For such action is necessary to complete the illegal scheme.

So by the first and second sections of the Act of July 2, 1890, it was declared unlawful to make a contract in restraint of trade, or to engage in a combination or conspiracy for that purpose; or to monopolize or attempt to monopolize or combine or conspire with others to monopolize interstate trade. By these provisions of the Act, Congress struck at the initial step towards the creation of these injurious combinations by imposing heavy penalties for joining in them.

And by the Seventh Section penalties, in the nature of treble damages and attorneys' fees, were provided to protect the independent trader by giving him a right of action if injured in his business or property by the combination or those endeavoring to create the monopoly. By the several sections thus construed those engaged in interstate trade were not only punished for making contracts restraining themselves from competing with each other, but were also punished for any acts done to the injury or destruction of the business of rival traders, and full and free competition in interstate trade, the single purpose at which Congress aimed, was thus provided for.

There is not only no language in the Act from which it could be inferred that Congress meant to protect the business of those engaged in trade wholly within the States, but in the case of Addys-

ton Pipe & Steel Co. v. United States, 175 U. S., 211, 247, it is expressly held that Congress has no jurisdiction over that part of a combination or agreement which relates to commerce wholly within the State and which is subject alone to the jurisdiction of the State. Whenever, therefore, the business of a water works company, of a laundryman, a retail druggist, or the like, is injured by a combination or monopoly, redress therefor must be sought under the laws of the State under which the business is carried on.

It is the single policy of the law to insure full and free competition in all branches of trade, and by competition not only to secure for the public such prices as are fixed by the natural laws of supply and demand, but the further benefits accruing from the existence of a large number of independent traders who can support themselves and families out of the profits of their own business if it is not destroyed, or they are not forced to accept employment from some all-controlling trust. But in no other manner than providing for competition does the law seek to control the acquisition or dispose of property, or to regulate or prescribe the prices at which it shall be sold. These principles have been declared by this Court in construing the Act of Congress prohibiting trusts and monopolies as they apply to that part of commerce within its control. If every trader, whose business it is to buy or sell goods, to be shipped from one State to another, is prohibited from making contracts in restraint of his trade, and is protected in his business from injuries done thereto by combinations to restrain or interfere with it, then there is necessarily that freedom of competition in interstate commerce which it is the object of the Anti-trust Act to secure. But to extend the operation of the act so as to give a right of acion, under the Seventh Section thereof, to every consumer seeking to recover back, as excessive, a part of the price paid for goods bought and shipped from another State, would include a class of actions not contemplated by Congress, and not necessary to insure competition in interstate trade. Such damages could only arise from fraud or deceit in making the sale, and would be governed by the laws of the State under which the contract was made and to be performed.

The act in question has been construed and applied in the following cases:

Montague & Co. v. Lowry, 193 U. S., 38, in which the plaintiffs, residents of California, were dealers in tiles, mantles and grates. Before the combination formed by the defendants, who were sued

in the case, plaintiffs had bought their tiles from manufacturers in the Eastern States, and had carried on a business in competition with the members of the offending association. They had established a profitable business which was interstate in character, and this was injured as a direct result of the action of the combination. Their suit for damages was sustained under the Seventh Section of the Act.

In Gibbs v. McNeeley, 118 Fed. R., 127, decided by the Circuit Court of Appeals of the Ninth Circuit, the character of the suit and the right to recover is thus stated by the Court:

"The plaintiff in error is in the business of buying the manufactured article in the state where it is manufactured, and selling it to purchasers in other states. The acts charged against the defendants in error interfere with his 'contracts to buy, sell or exchange goods to be transported among the several states'—contracts which are made and negotiated between the plaintiff in error and his customers in various states—and the acts of the defendants are in restraint of the interstate commerce in which he is engaged. We think the complainant states a cause of action."

Whitwell v. Continental Tobacco Co., 125 Fed. R., 545, decided by the Court of Appeals of the Eighth Circuit, was an action, as appears from the opinion of the Court, based "on the sole ground that the defendants refused to sell the manufactured products of the Tobacco Company to him (the plaintiff) at prices which would enable him to resell them to others at a profit, unless he refrained from buying, selling or handling plug chewing tobacco made by independent manufacturers who were competing with the Tobacco Company for the trade of the country. All the parties to the suit were engaged in interstate commerce, and the products in question were the subjects thereof. The main question which the case presents is, may one engaged in commerce among the states lawfully select his customers, and sell only to those who do not buy or sell the wares of his competitors, or is such a restriction of his own trade by a manufacturer or merchant and his employes a 'contract, combination or conspiracy in restraint of trade' or an "attempt to monopolize any part of trade,' within the meaning of the Act of July 2, 1890?"

It was held by the Court that the defendants' method of conducting its business was not within the prohibition of the Act of Congress, and that for that reason there could be no recoveryy, and in conclusion the Court said further:

"There is another reason why the complainant in this action fails to state facts sufficient to constitute a cause of action: The sole cause of the damages claimed in it is shown to be the refusal of the defendants to sell their goods to the plaintiff at prices which would enable him to resell them with a profit. Now, no act or omission of a party is actionable, no act or omission of a person causes legal injury to another, unless it is either a breach of a contract with, or a duty to, him. The damages from other acts or omissions form a part of that *damnum absque injuria* for which no action can be maintained or recovery had in the courts. The defendants had not agreed to sell their goods to the plaintiff at prices which would make their purchase profitable to him, so that the damages he suffered did not result from any breach of any contract with him. They were not caused by the breach of any legal duty to the plaintiff, for the defendants owed him no duty to sell their products to him at any price, much less at prices so low that he could realize a profit by selling them again to others. The complaint, therefore, fails to show that any legal injury or actionable damages were inflicted upon the plaintiff by the acts of the defendants, and the judgment below is affirmed."

In each of these cases the cause of the damages sued for was an injury done to a business that was interstate in character, and we have been unable to find any case in which a suit has been brought of the character now before the Court. On the authorities and for the reasons stated we insist that the declaration failed to state a cause of action under the Seventh Section of the Anti-trust Act.

The demurrer to the declaration should have been sustained for another reason: It appears that defendant in error contracted with the Anniston Company for the purchase of pipe at an agreed price fixed in the contract. This agreement was legal and binding upon the defendant in error under the laws of Georgia, where it was made and to be performed, notwithstanding the fact that the selling company was a party to a contract in restraint of trade, which was illegal under the laws of the United States.

National Distilling Co. v. Cream City Importing Co., 86 Wis., 352;

Connolly v. Union Sewer Pipe Co., 184 U. S., 540.

The damages suffered by the defendant in error, as alleged, resulted from the making of this contract, which was collateral to the agreement in restraint of trade. If a purchaser under such contract could sustain an action for damages on account of the price fixed therein, after receiving and using the goods bought by him, his own act in making the purchase would necessarily be the proximate cause of his injury. And the result would be the same if the contract was procured by fraud and deceit, as is alleged in the declaration; for, in the first place, if the contract was so obtained the remedy would be either to set it aside for the fraud, or to affirm and sue for the damages caused by the fraud and deceit. Neither of these actions could be sustained under the Act of Congress. While Congress has prohibited the making of contracts in restraint of trade, it has not denied to the parties to such contract the right to make sales of the goods in which they deal; and it has not, by the Act in question, provided that they shall be liable for three-fold damages on account of any fraud practiced by them in making sales of their goods. If the plaintiffs in error and their associates were guilty of making fraudulent bids, on the contracts let by the defendant in error, such acts were in violation of the laws of Georgia, under which defendant in error would have a right of action for whatever damages it actually sustained. This would be the only remedy the defendant in error would have, unless it elected to rescind the contracts of sale and sue for the recovery of the amounts paid for the pipe and fittings.

We further insist that the Anti-trust Act is not a legal method of regulating prices. While denying to interstate traders the right to form combinations that would have the power to prescribe prices, Congress did not undertake itself to do, either directly or indirectly, what it prohibited to others. An action for three-fold damages under the Act of Congress will only lie where there has been an actual, direct injury inflicted by something done in violation of the Act (Minn. v. Northern Securities Co., 194 U. S., 48, 70), and this injury must have been done to the person suing in his business of interstate commerce, or in his property while the subject of interstate commerce.

STATUTE OF LIMITATIONS APPLICABLE

The plaintiff in error relied upon the statute of limitations of the State of Tennessee (1) barring the suit in one year as a "statute penalty;" and (2) barring the suit in three years as an injury to property by tort. The Circuit Court sustained the demurrer of defendant in error to the plea of one year, but overruled the demurrer to the plea of three years, and on the trial directed a verdict for the plaintiff in error because the evidence showed that the action accrued more than three years before the suit was brought.

The Circuit Court of Appeals reversed this judgment and held that the State Statute applicable was that of ten years, which barred all suits not otherwise provided for. Both Courts denied the contention of defendant in error that the limitation applicable was that provided by Section 1047 of the Revised Statutes of the United States barring suits for penalties or forfeitures, accruing under the laws of the United States, in five years.

The question, then, according to the decisions of both Courts, is, which of the limitations under the State law bars the action?

The suit is brought under Section 7 of the Act of July 2, 1890, which is as follows:

"Any person who shall be injured in his business or property by any other person or corporation, by reason of anything forbidden or declared to be unlawful by this act, may sue therefor, * * * * without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

If the suit is not one for injuries sustained by the party suing in his business or property, by reason of the things forbidden by the Act, it does not fall within the class of suits described. The Act of Congress forbids certain things and gives to any person injured thereby the right to sue for three-fold the damages by him sustained in his business or property. The form of action is not prescribed, but it is clearly *ex delicto* in its nature.

The declaration in this case charges that plaintiffs in error, with others, entered into a contract, combination, or conspiracy to restrain interstate trade, by exacting on goods sold a "bonus" above the fair price, and secured contracts from the defendant in error

by submiting false bids at its public lettings—concealing the combination existing between them, and thus fraudulently deceived and imposed on defendant in error and obtained from it excessive prices for pipe and fittings bought and used in its water system. Whether or not this declaration states a case within the Seventh Section of the Anti-trust Act, it does state one which is both in form and substance *ex delicto* in character. The declaration charges, in effect, that by wrongful acts the defendants had inflicted injuries on the plaintiff in its business or property for which it was entitled to recover trebled damages and attorneys' fees.

THE STATE STATUTES OF LIMITATIONS PRIOR TO 1858

Before the enactment of the Code of 1858 all pleadings in actions at law were governed by the common law. The statute of limitations was the Act of 1715, Ch. 27, Sec. 5.

This statute barred the following actions within three years: "Actions of account rendered, actions upon the case, action of debt for arrearages of rent, actions of detinue, replevin and trespass. *quare clausum fregit,* * * * * except such actions as concern the trade of merchandise between merchant and merchant and their factors or servants."

Within one year: "Actions of trespass, assault and battery, wounding, imprisonment or any of them."

Within six months: "Actions upon the case for slanderous words."

In a preliminary statement of all the actions to which the act would apply "actions sur trover" were included, and they were recognized as within the three-year limitation.

The statute of limitations of 21 James 1, Ch. 16, Sec. 3, was in force in Tennessee, as held by the Supreme Court, and barred in six years actions of debt grounded upon any lending or contract without specialty. It was held that this statute did not apply to contracts under seal.

As will be seen from the decisions of the Supreme Court of Tennessee, to be cited, case, trover, detinue, replevin and trespass as providd by the common law covered every species of actionable wrong where property was damaged or taken.

By the Act of 1850, Ch. 141, the legislature of Tennessee gave the optionable right to sue in an action on the case "in all cases

where an action of trespass would lie by the existing law." Case thus became a proper remedy where the wrong was by force and the injury to the property direct and not merely consequential. If an action of trespass was resorted to for such an injury it was barred in one year under the Act of 1715; but if the plaintiff exercised his option to sue in an action on the case the three-year limitation applied.

THE PRESENT STATUTE OF LIMITATIONS

The following changes in the prior laws affecting the limitations of actions were made by the Code of 1858:

By Section 1804 the use of private seals in written contracts was abolished, and it was provided that the addition of a seal to instruments thereafter made would not affect their character in any respect. (Shannon's Code, 3213.)

"FORMS OF ACTION"

"2746. *One Form of Action in Contract.* All contracts may be sued on in the same form of action."

"2747. *Action on the Case for Wrongs and Penalties.* All wrongs and injuries to the property and person, in which money only is demanded as damages, may be redressed by an action on the facts of the case. Penal actions may be brought in the same form."

"2748. *Counts in Tort and Contract May Be Joined.* Whenever the facts of the case entitle the plaintiff to sue for breach of contract, or, at his election, for the wrong and injury, he may join statements of his cause of action in both forms, or either."

Shannon's Code, 4437 et seq.

The direct effect of these provisions of the Code was to abolish all distinction between ordinary contracts and those under seal, and to provide one form of action on all contracts, whether specialties or not. There was also provided one common form of action for all wrongs or torts, and penal actions. The adoption of one form in all actions *ex contractu,* and one in all actions *ex delicto,* made it necessary to remodel the statutes of limitations so they would apply to the cause of action and not the form of the action as they did previous to the change. And this was done as follows:

LIMITATION OF ACTIONS OTHER THAN REAL

"2769. All civil actions other than those for causes embraced in the foregoing article (real actions), shall be commenced after the cause of action has accrued, within the periods prescribed in this chapter, unless otherwise expressly provided."

2770. Property lost at gaming, action of loser barred in ninety days; of wife, children or next kin, in twelve months; of creditor, in twenty-four months.

"2771. For slanderous words, in six months."

"2772. *One year for libel, personal injuries, false imprisonment, etc., and statute penalties.* Actions for libel, for injuries to the person, false imprisonment, malicious prosecution, criminal conversation, seduction, breach of marriage promise and statute penalties, within one year after cause of action accrued."

"2773. *Three years, for injuries to property, detention or conversion of personalty.* Actions for injuries to personal or real property; actions for the detention or conversion of personal property, within three years from the accruing of the cause of action."

"2774. *Three years against sureties of collecting officer when process returned satisfied.* Actions against sureties of any collecting officer, for failing to pay over money collected, when he has made return of an execution or other process that the money is made or the process satisfied, within three years from the return of the process."

"2775. Actions for the use and occupation of land and actions against the sureties of guardians, executors, and administrators, sheriffs, clerks and other public officers for nonfeasance, misfeasance and malfeasance in office; actions on contracts not otherwise expressly provided for, within six years after the cause of action accrued."

"2776. Actions against guardians, executors, administrators, sheriffs, clerks and other public officers on their bonds; actions on judgments and decrees of courts of record of this or any other State or Government, and all other cases not expressly provided for, within ten years after the cause of action accrued."

Shannon's Code, 4466 et seq.

Under these sections the longer period is allowed for commencing actions on contract as under the statutes previously in force.

While the Code, with some exceptions, adopts the period of six years for commencing actions on contracts, as did the Statute 21 James 1, Ch. 16, Sec. 3, it does not except specialties from the operation of the limitation as the English Statute did; and since 1858 that old distinction has never been recognized by the Courts of Tennessee except in a few actions on contracts that were executed under seal before that time.

All actions for injuries by wrongs or torts are by the foregoing provisions barred in times ranging from six months to three years, according to the enumerated causes of action, which is in general accord with the Act of 1715 prescribing the limitations applicable to case, trespass, trover, detinue and replevin. The intent is manifest to cover by Sections 2771 to 2773, inclusive, all causes of action for which at common law the forms stated were the appropriate remedies.

The judgment of the Circuit Court of Appeals on the question of the statute of limitations applicable was rested on the three propositions which follow and are considered in turn.

First: That an action under the Seventh Section of the Anti-trust Act was one for the enforcement of a civil remedy—the recovery permitted of excess over actual damages being in the nature of exemplary damages, and was therefore not barred by Section 1047, Revised Statutes, fixing the limitation on "suits or prosecutions for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States." *But it was held that for the same reason it was not within the Statute of the State barring in one year suits for "statute penalties."*

Second: That the damages claimed were not on account of injuries to property and the suit was not therefore barred by the three-year statute.

Third: That the action was not *ex contractu* in its nature and not barred by the six-year limitation, and was therefore within the limitation of the ten-year statute as a case "not otherwise provided for."

CONSIDERED AS AN ACTION FOR STATUTE PENALTIES

It is conclusively settled, by the authorities cited, in the opinions of the lower courts ,that Section 1047 of the Revised Statutes applies only to fines, forfeitures or penalties in the criminal sense.

The penalties referred to in this section are those enforced as punishment for the violation of law and belong to the United States in its sovereign capacity. They are therefore subject to the pardoning power of the Government, and no individual has any interest in them. They are penal in the international sense. The distinction between statutes penal in this sense and remedial statutes is clearly pointed out in Huntington vs. Attrill, 146 U. S., 657, 667, where the defendant relied upon the maxim of the international law, that "The Courts of no country execute the penal laws of another;" and in Brady vs. Daly, 175 U. S., 148, wherein the defense was that the Circuit Court had no jurisdiction because the action was one to recover a penalty of which the District Court had exclusive jurisdiction.

In each of these cases the determinative question was whether the suit was criminal in its nature, or one for the recovery of damages sustained by the plaintiff. If of the latter class, for the reason that the statute permitting the recovery sued for was remedial in character, then the suit was civil in its nature, and the defense in neither of the cases was good. And so it was held. And, as stated, the Court of Appeals held that this statute (1047, Revised Statutes) had no application to the suit at bar.

But Section 2747 of the Tennessee Code of 1858, relating to the forms of actions, and Sections 2769 and 2772, prescribing the limitation of actions, refer expressly to "penal actions" and "action for * * * * statute penalties," as "civil actions."

There are other sections of the same Code relating to the penalties for public offenses. Section 4596 provides:

"When the performance of any act is prohibited by statute, and no penalty for the violation of such statute is imposed, the doing of such act is a misdemeanor." Section 4983 bars in twelve months all prosecutions for misdemeanors, which includes all suits to collect penalties due the State for violation of its laws.

Shannon's Code, Sections 6437 and 6942.

Under this section it is held that criminal prosecutions commenced either by warrant or indictment are barred in twelve months; and that an indictment may be quashed unless it shows on its face that the offense was committed within a year.

State vs. House, Tenn. 2, Shan. Cases, 610.
State vs. Shaw, 113 Tenn., 536.

It is also held that misdemeanors are not within the meaning of the constitutional provisions ordaining that the right of trial by jury shall remain inviolate, and that no party shall be put to answer any criminal charge except by indictment or presentment; and an action of debt for a penalty incurred by violating a statute or municipal ordinance against public offenses, is a proper proceeding, in which the offender can be arrested and required to secure the judgment. Hogan vs. Chattanooga, 2 Tenn. (Shan.), 339.

Penalties sued for by municipalities are in the nature of punishment for misdemeanors against the peace and good order of the special community. Greenwood vs. State, 6 Bax., 567, 576. And it has never been doubted in Tennessee since the enactment of the Code that every proceeding to impose punishment for a misdemeanor, whether by indictment, or by warrant in the nature of debt, was barred in twelve months. "Misdemeanors" is used in the Code of Tennessee as it is at common law (31 Bl. Com. 2) to refer to the violations of public rights and dutes "which affect the whole community as a community." For these reasons we contend that Section 4983 is the Statute of Tennessee that bars, under the laws of that State, the class of penalties referred to in Section 1047 of the Revised Statutes—"penalties" which, under the laws of the United States, can only be recovered in the District Court, and payment of which will not be enforced by the Courts of any other country.

But in Section 2772 "action for statute penalties" is denominated a civil action and is barred as such, together with other actions for damages for wrongs and torts under the common law, enumerated in the same section. Libel, breach of marriage contract, and the other actions barred by the same statute were all torts for which case was the proper remedy before the enactment of the Code of 1858; and by Section 2747 case was made the proper remedy for the recovery of statute penalties.

Under the statutes cited all suits for statute penalties are barred in twelve months, whether imposed for offenses against the public or for wrongs and injuries to individuals. If for public offenses, they are barred by Section 4983; if for wrongs to the rights of individuals, by Section 2772. It is manifest that the compilers of the Code had in contemplation actions for penalties imposed for offenses against the public, or misdemeanors, and also actions for

penalties given to the party aggrieved by prohibited acts, for separate statutes of limitations are prescribed—one barring criminal and the other civil actions for statute penalties. The first would bar suits for offenses against the public and the last would necessarily relate to the suit of the party aggrieved by an act prohibited by statute.

As already shown, all suits and prosecutions to enforce penalties due to the public for misdemeanors are barred by Section 4983; and the remaining question is what character of suit is barred by Section 2772? By the terms of the statute it is a "civil action," and in form an action on the case for "statute penalties." In Huntington vs. Attrill, Supra, this Court said:

"The question whether a statute of one State, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the Courts of another State, depends upon the question whether its purpose is to punish an offense against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act."

The statute in question does not refer to a suit for a penalty, the purpose of which "is to punish an offense against the public justice of the State," but it relates to penalties in which the public is not interested, and other authorities must be appealed to for the sense in which the terms are used. The following cases illustrate, as we insist, the character of suit referred to:

In Young vs. Donaldson (2 Heis., 55) a motion was made against a sheriff for insufficient return on an execution. The statute authorized an action "for the amount due upon such execution and twelve and one-half per cent. damages." The damages were held to be in the nature of a penalty, but the question of the limitation applicable was not involved. But the question did arise in the subsequent case of Woodward vs. Alston, 12 Heis., 581. The legislature had authorized motions (classed as "actions" under the statute of limitations) against clerks for fees paid to them for enrolling records, where there was a failure to perform the service for which the fees were paid. Motions were made against a clerk to recover the amount of fees charged and collected by him for enrolling the proceedings in causes finally determined in his Court, where the enrollment was not made. The statute of limitations of one year was pleaded in bar of the action. It was held that the fees, collected for enrollments not made, was money had and received for which the clerk had rendered no consideration; and

that there was nothing in the nature of *punishment* in requiring him to pay over to the county money so received and held, to enable the county to pay for having the enrollments made. The case was distinguished from actions permitting the recovery, not only of the amount received, but twelve and a half per cent. as damages. "It will be observed," said the Court, "that these motions are only to recover the amount of the enrollment fees, not for any damages by way of penalty."

In Merchants's Bank vs. Bliss (35 N. Y., 412) a creditor of a corporation sued its trustees for neglecting to file and publish an annual report, and paying dividends while the corporation was insolvent. For such acts the charter made the trustees liable for the debts of the company. It was held that the suit was barred under a statute of limitations prescribing the time for commencing "an action upon a statute for a penalty or forfeiture, which action is given to the party aggrieved." It was said by the Court: "The liability, it must be observed, is not limited to the injury or damage sustained by the creditors in consequence of the violaton; but upon failure to file the report, or upon making a prohibited dividend, however small or trifling the amount, the trustees are subjected to the payment of the whole amount of the debts of the company then existing, and for all that shall be contracted, in the one case, before the report shall be made, and in the other, while they shall respectively continue in office. These provisions appear to be severally punitive, inflicted on grounds of public policy, for the protection of creditors, and the prevention of frauds upon the public in respect to the financial condition of such corporations. It is clear, that the liabilty of the trustees is not imposed as an indemnity, because it has no relation to the actual loss or injury sustained by the party in whose favor the action is given. The action depends wholly upon the statute; there never was any such remedy, or cause of action, in whole or in part, at common law. If any acton could have been maintained at common law, for either of the causes mentioned in Sections 12 and 13 of the general act, in relation to manufacturing corporations, it could extend only to the actual damages or injury sustained."

It was again held in Stokes vs. Stickney (96 N. Y., 326) that the actions given by the statutes against the trustees were actions to recover penalties, and not for compensation to the injured party for damages sustained by him; that they were actions *ex delicto* and were extinguished on the death of the tort-feasor.

There was no conflict between the decision of this Court in Huntington vs. Attrill and that of the Court of Appeals of New York in Merchants' Bank vs. Bliss, although in the first case it was held that the statute in question was not penal, while in the latter case the same statute was held to be a penal one. The question determined by this Court was that the recovery authorized by the statute was not a penalty given as a redress for a *public wrong*—or a penalty in the international sense; while the question decided by the New York Court of Appeals was, as this Court said, in the former case (pp. 677-8), that the statute was penal "within the meaning of a statute of limitations applicable to private actions only."

A statute may not be penal in the international sense of that term, but penal within the meaning of the statutes of limitations applicable to private actions only. In each of the following cases the suit was brought to enforce a statutory liability given to the party aggrieved by the prohibited act, and each of them was held to be a penal action within the meaning of the statutes of limitation barring civil suits for statute penalties:

Beadle vs. Railroad Company, 48 Kan., 379, S. C. 51 Kan., 252, a suit brought to recover three-fold the damage sustained by excessive freight charges.

Savings Bank vs. Bailey, 66 N. H., 334, a suit to recover three times the excess of six per cent. interest.

Gridley vs. Barnes, 103 Ill., 211, a suit to collect the debts of a corporation from its trustees on account of beginning business before the whole amount of the capital was paid in and the certificate thereof recorded.

Baker Wire Co. vs. Chicago & N. W. Ry. Co., 106 Iowa, 239, an action to recover treble the amount of excessive freight charges.

A. T. & S. F. Ryyy. Co. vs. Tanner, 19 Colo., 559, a suit to recover twice the full value of stock killed in violation of the terms of the statute.

State Savings Bank vs. Johnson, 18 Mon., 440, a suit to hold the trustees of a corporation liable for its debts for failing to make reports required by the statutes regulating corporations.

Raticon vs. Terminal R. Assn., 114 Fed. R., 666, a suit to recover damages in consequence of unjust discrimination as prohibited by

the Interstate Commerce Act, together with reasonable attorneys' fees; citing as to the character of the statute Parsons vs. Railroad Co., 167 U. S., 447.

Davis vs. Mills, 113 Fed. R., 678, a suit brought in Connecticut to enforce a liability imposed on trustees of corporations by statute of Montana for failing to make annual reports.

On appeal in this case it was held that the Connecticut statute did not apply to civil actions for penalties; and that the laws of Montana expressly excepted the liability in suit from the statute of limitations barring penal actions. 121 Fed. R., 703.

Patterson vs. Wade, 115 Fed. R., 770, a suit on a State statute to hold directors liable for a debt of a corporation for declaring a dividend while it was insolvent.

In Goodridge vs. Union Pac. Ry. Co., 35 Fed. R., the plaintiff sought to recover treble damages under a statute of Colorado prohibiting unjust discrimination in freight charges. The statute of limitations provided that all actions for penalties under any penal statute, whether by the State, or any person to whom the penalty was given, should be commenced within one year. It was held by Mr. Justice Brewer that the Statute was a penal one within the meaning of the statute of limitations. He said:

"The statute forbids unjust discriminations, and then section 9 gives triple damages in case of such unjust discrimination. This section is headed 'penalty,' and the party injured is authorized to recover three times the actual damage. Now, this excess above the actual damage is something imposed as a penalty upon a railroad company for doing that which by a former section of the statute is forbidden. A remedial statute is one which simply furnishes a new remedy, or makes a more perfect remedy than existed before; so that the party injured under the new statute may more effectually secure full compensation for the injury which he has suffered. A penal statute is one which, while it may secure actual compensation, goes beyond and punishes the wrongdoer for the wrong he has done; and it matters not that none of the penalty goes to the State, and that all goes to the party injured. Statutes are very frequent in all States—and it is in the exercise of the police power of the State that they are passed—which, giving full compensation, say, in addition, that the wrongdoer shall forfeit or pay double, triple damages, or a fixed sum or penalty, for the wrong he has

done. If I had any dubt upon that proposition it would be settled by the case of Railroad Co. v. Humes, 115 U. S., 512, 6 Sup. Ct. Rep. 110, in which was considered a statute of Missouri, which gave to a party double damages in case its cattle were injured by a railroad whose track was not fenced. That statute is like this. There the cattle of Humes were injured, and he was entitled to recover double damages. Here the party who is wronged by unjust discrimination is allowed to recover triple damages. All goes in this case to the party injured; all went in that case to the party injured. It was held that the action was brought under a penal statute—was an action for a penalty—that the additional damages were by way of punishment to the company for its negligence, and that it was not a valid objection that the sufferer, instead of the state, received them. The mode in which fines and penalties shall be imposed, whether at the suit of a private party or at the suit of the public, what disposition shall be made of the amounts collected, are matters of legislative discretion. The opinion discusses the matter at some length, clearly showing what, I think, outside of and independent of that decision, would be plain—that an action of this kind is an action to recover a penalty."

In actions of trespass or trespass on the case for torts a jury may inflict vindictive or punitive damages in excess of compensation for the injury sustained, which is sometimes called "smart money." This rule is confined to cases where the wrong has been inflicted wantonly, maliciously, or with a bad motive. These attending circumstances authorize the imposition of more than compensatory damages in order to deter others from like wrongs, and because the interests of society become blended with that of the sufferer.

Barry vs. Edmonds, 116 U. S., 550, 565.

And in accordance with the rule that punishment may be imposed by juries for private offenses, where the circumstances warrant, it has been held that the legislature may, as punishment, impose double or treble damages for violations of duties declared by statute. Such statutes are passed in the exercise of the police power and are penal.

Mo. Pac. Ry. Co. vs. Humes, 115 U. S., 522.
Minneapolis Ry. Co. vs. Beckwith, 129 U. S., 35.

If the penalty, or recovery in excess of compensatory damages, is imposed for a failure to pay a debt, and not in the exercise of

the police power which concerns the interest of the public, then the statute is unconstitutional.

Gulf C. & S. F. Ry. Co. vs. Ellis, 165 U. S., 150;
Atchison, Topeka, etc., Railroad vs. Matthews, 174 U. S., 96;
Railroads vs. Crider, 91 Tenn., 490.

We submit that under the authorities cited the action of defendants in error is barred as a statute penalty under section of the Tennessee Code limiting the time for commencing such actions to one year. The suit was brought not only to recover treble damages for the injury sustained, but attorneys' fees besides. The actual damages as found by the jury was $1,500; but the judgment rendered was for $7,000, or nearly five times the damages actually suffered. This judgment can be sustained upon no other principle than that declared in the cases cited—that is, vindictive or punitive damages, and imposed under the police power of the government for the purpose of deterring others from the commission of similar offenses.

THE STATUTE OF THREE YEARS

If not barred as a statute penalty in one year, the action is within Section 2747, providing that "all wrongs and injuries to the property and person, in which money only is demanded as damages, may be redressed by an action on the facts of the case," and Section 2773, providing that "actions for injuries to personal or real property; actions for the detention or conversion of personal property (shall be commenced) within three years from the accruing of the cause of action."

The statutes fixing longer periods of limitation refer to actions against the sureties of guardians, etc., and sheriffs and other public officers, for malfeasance, misfeasance and non-feasance in office, and all contracts to be commenced within six years. And actions against guardians, etc., and all public officers, actions on judgments and decrees," and "'all other cases not expressly provided for" within ten years.

The Circuit Court of Appeals reversed the holding of the Circuit Court that the suit of defendant in error was barred by Sections 2773, and held that the statute of ten years applied as the case was one not expressly provided. This conclusion is founded

on the following reasoning: (1) That Section 2773 (Shan., 4470) recognizes "two kinds of injury to which tangible property is susceptible—one by damage which does not affect the possession, and the other by a taking or detention which does." (2) That while the precise question had not been decided by the Suprme Court of Tennessee, from cases cited, that Court had manifested an indisposition to extend the meaning of the statute so as to include suits which did not "involve any actual injury to property." (3) That as a statutory liability, "not being a statute penalty, and not dependent upon any contract, express or implied," the action was therefore not expressly provided for—and being "an action of debt which was grounded upon a specialty," was not within the statute of 21 James 1, Ch. 16.

We will undertake to answer in their order these objections to the application of the three-year limitation. We state below the limitation of actions of tort as provided by the Act of 1715 and as carried into the Code of 1858:

In six months—Slander, under both statutes.

In one year—Under Act of 1715, all actions of trespass, assault and battery, wounding or imprisonment; under the Code, libel, injuries to the person, false imprisonment, malicious prosecution, criminal conversation, seduction, breach of marriage promise, and statutory penalties.

In three years—Under Act of 1715, actions on the case and trover, actions of detinue, replevin, and trespass, *quare clausum fregit;* under the Code, all actions for injuries to personal or real property, and for the detention or conversion of personal property.

In remodelling the statutes of limitations so they would apply to the cause of action, after the forms were abolished, the terms used by the codifiers were employed in their common law or technical sense. "Wrongs and injuries" as used in the chapter relating to the forms of action are the same terms used by Blackstone to denote torts. And the statute of limitations is framed with careful regard to common law classifications. The statutes of six months and of one year include every form of wrong at common law "respecting the rights of persons," whether the absolute or relative rights, and whether redressible by an action of trespass or on the case.

The other subjects of injury by torts was property. Chitty says of the common law actions, "Those for *wrongs* are case, trover,

replevin, and trespass *vi et armis.*" And he includes detinue and trespass *quare clausum fregit.*

Trespass included "every description of *wrong,*" and was the remedy for "the different injuries committed by force to the *person* or *personal* or *real* property." It could not be "sustained where the wrong complained of was a *non-feasance;* as for carrying away tithes, etc.; or where the matter affected was not tangible, and consequently could not be immediately injured by force, as reputation, health, etc., * * * * or where the injury was not immediate, but consequential." (Chitty Pl. p. 187.)

Case is a proper remedy, says the same author, for injuries to *personal* property not commited with force, or not immediate, or where the plaintiff's right thereto is in reversion. It lies against attorneys or other agents for *neglect* or other breach of duty, or misfeasance in the conduct of a cause, or other business, etc., though it has been more usual to declare against them in assumpsit. (p. 151.) It also lies for consequential injuries to real property. Case and trover are often concurrent remedies. "Case is necessarily the form of action to be adopted for deceitfully representing a person to be fit to be trusted, or other deceit, independently of and without relation to any contract between the parties." (p. 154.)

It is further said: "Whenever a statute prohibits an injury to an individual, or enacts that he shall recover a penalty or damages for such injury, though the statute be silent as to the form of the remedy, this action, or in some instances an action of debt, may be supported." (p. 161.)

Trover is the proper remedy in all cases where damage is sought for personal property illegally taken and appropriated or destroyed, or where the defendant exercised dominion over it in defiance of the owner's rights.

Replevin is an action to recover the possession of property wrongfully taken, and detinue for wrongfully detaining property.

These actions under the common law system of pleading covered every species of wrong or tort by which property either personal or real, tangible or intangible, was injured or wrongfully held in possession.

By the Act of 1715, case, trover, detinue, replevin and trespass *quare clasum fregit,* were all barred in three years. By the Act

of 1850, Ch. 141, case would lie in all cases where trespass was the remedy at common law. The limitation prescribed by the Act of 1715 applied alike to injuries to the person, the personal relations and to property. When the Code of 1858 fixed one year as a bar to all wrongs respecting the person and personal relations, it left without any limitation all that class of wrongs or torts relating to injuries to property, unless they are covered by the language of section 2773: "actions for injuries to personal or real property; actions for the detention or conversion of personal property."

This section, as we contend, was meant to apply to all injuries to property of every description, whether the injury was by force and immediate to tangible property in the actual or constructive possession of the owner; or without force, to tangible or intangible property in possession or reversion; and where the injury was consequential and not immediate: As for damage caused by doing an act prohibited by statute, the loss being consequential; or for loss by fraudulently and deceitfully recommending another as worthy of credit; or for damages caused to business or trade by conspiracy; and a number of other wrongs which could result in no injury to any specific or tangible property, but would be the proximate cause of a temporal loss or damage to another. The remedy for all such injuries to property were at common law case or trespass, and they are now included in the comprehensive designation of "actions for injuries to personal or real property."

In like manner "actions for the detention or conversion of personal property" cover the old actions which related to personal property only—trover, replevin and detinue.

A wrong, as Blackstone says, is "nothing else but a deprivation of right;" and *injury* is the extent of the deprivation, or the measure of the right of compensation in damages, which is itself a species of property. (1 Sedg. Dom., Secs. 29, 32.) The cases cited by the same author in Sections 100-102 illustrate the character of property rights for the deprivation of which a remedy was afforded by the English law by an action on the case.

Bouvier thus defines "Property:" "The right and interest which a man has in lands and chattels to the exclusion of others." And he distinguishes between the things which are and which are not the subject of property.

"Personal property," he says, is "the right or interest which a man has in things personal."

According to another author (Anderson's Dictionary of Law) it means "(1) In an abstract sense, ownership, title, estate, right. (2) In a concrete sense, the thing itself which is owned." "The right to take and prosecute an appeal is property, within the meaning of a statute against extorting property by threats." "Everything which goes to make up one's wealth or estate."

The following cases will illustrate the character of injuries which, before the adoption of the Code of 1858, would support an action on the case:

The value of a chattel fraudulently paid for in counterfeit bank notes: Love vs. Hogan, 5 Yer., 290. Loss in the value of an article bought on fraudulent representations; a debt lost, where the credit was given on false and deceitful representations that the party was solvent and worthy of credit: Allison vs. Tyson, 5 Hum., 449; Rosson vs. Hancock, 3 Sneed, 434; Gwinther vs. Gerding, 3 Head, 198. Generally the wrongs for which redress was sought in actions on the case, involved no injury to any particular articles or things, but the depreciation in value of some right or estate by fraud, malice, deceit, or other misconduct for which damages was the legal compensation.

And since the Code the Courts of Tennessee have recognized as actionable the same class of injuries by trespass or wrong, as will appear from the following cases:

Bank vs. Doughty, 2 Tenn. (Shan.) 584 was an action of trespass on the case for fraud, in which it appeared that the defendant fraudulently withheld a petition in bankruptcy intrusted to him to be filed, so that plaintiff as a creditor of the bankrupt lost his interest in property covered by a mortgage executed within six months of the time when the petition should have been filed.

In Railroad vs. Guthrie, 10 Lea, 432, the railroad company sued the defendant Guthrie for the wrongful removal of a fence along its right of way. Two causes of action were stated: one for the damages which the plaintiff had been compelled to pay for stock killed on its right of way on account of the removal of the fence, and the other for the value of the rails taken. The first, the Court held, was in tort and barred in three years.

In Ramsey vs. Temple, 3 Lea, 252, a bill was filed in Chancery to recover damages of an attorney for ordering an execution held up whereby the judgment was lost by the subsequent insolvency

of the debtor. The bill was demurred to because within the following exception specified in the act conferring jurisdiction of law cases on Courts of equity: "except injuries to persons, property or character, involving unliquidated damages." In sustaining the demurrer the Court said:

"The acts complained of are certainly in the nature of torts. An injury to 'property' in its broadest sense would certainly include any tort injuring or destroying a chose in action, or rendering it valueless by defeating and obstructing the plaintiff in its collection.

"From the very nature of the acts complained of, the damages are unliquidated and not fixed by contract. They may be greater or less according as the extent of the injury may be shown by proof; and the character of the question is not changed by the allegation that the injury complained of has resulted in the loss of the entire debt; this allegation does not render the damages in their nature liquidated or certain. We admit that this act might be construed otherwise, but for the reason stated we deem a strict construction proper. For the same and perhaps stronger reasons we see no answer to the statute of limitations. The wrongs complained of occurred more than six years before the bill was filed, and this being the longest time, the action was barred, unless there be some ground of exception."

In Rhea vs. Hooper, 5 Lea, 390, the plaintiff alleged in his bill that he had obtained license to establish a ferry which was then in operation; that the defendants had built a bridge that seriously injured the value of the ferry, and had taken a right of way which belonged to plaintiff's wife for an abuttment. It was held that the claim for damages to the ferry and right of way was within the exception quoted in the former case.

The exception excludes equity jurisdiction in all cases of injury to person or property by trespass, but does not refer to cases against officers and the sureties on their official bonds.

State for use vs. Keller, 11 Lea, 399, 402.

In the recent case of the J. M. James Co. vs. Bank, 105 Tenn., 1, it was held that where a bank, having funds on hand, refused and failed to pay checks of a depositor it was guilty of a tort and liable in damages resulting therefrom to the business and credit of the depositor. The Court held that the action was not

barred in six months as a suit for slander, but it would, as we insist, be barred in three years as an injury by tort or wrong to the plaintiff's property.

The cases show that there has been no departure in Tennessee from the rule of the common law, that the proper remedy for the deprivation of a right by a wrong or tort is an action of trespass on the case; that it is not necessary to show in such case a direct injury to tangible property, but an injury to rights in property of any description—a loss or damage to plaintiff in his estate. The value of goods fraudulently paid for in counterfeit bank notes, the shortage in value of goods bought on misrepresentation, debts lost on false and deceitful representations as to the solvency of purchasers on credit, money paid for stock killed on account of the wrongful removal of a fence, the depreciation in the value of a ferry by the building of a bridge, and damage to business and credit by wrongfully refusing to pay a depositor's check have all been recognized as injuries caused by torts. There was no injury in either of these cases to any tangible property, but there was an injury; and as it could not be classed as an injury to the person, it was an injury to property, and as such within the three-year statute of limitations, as an action on the case would have been under the Act of 1715.

To hold, as did the Court of Appeals, that this statute only applies in cases where the injury is to tangible property would in effect leave the State of Tennessee without any statute limting the time for commencing by far the most numerous class of suits for torts arising under its laws. We can but believe the Court of Appeals was misled by the simple but most comprehensive language of the three-year statute of limitations, and have misconstrued the terms of the statute on account of failing to recognize that it was intended to include those injuries for which the common law gave redress by an action of trespass on the case, as well as the injuries for which trespass *vi et armis* would lie, both for injuries to property in possession.

That Court erred, as we insist, in holding that the statute applied only to direct injuries to tangible property, and not to all wrongs which were injuries to or depreciated the value of another's estate, title or right in things of an exchangeable value, whether goods, chattels, or choses in action.

We next contend that there is no disposition on the part of the Courts of Tennessee to so limit the construction of the act; on the contrary, the cases cited are authorities for the opposite view. One of the cases cited on this point by the Court of Appeals is Alsbrooke vs. Hathaway, 3 Sneed, 454. But that cases was decided in 1856, and the question determined was that, where the goods of another were wrongfully taken and converted, he could waive the tort and sue in debt as for goods sold or money had and received. The Court said: "The principle is that the injured party may, at his election, sue in trespass or trover for the tort, or waive it, and sue as upon an implied promise to pay the value of the property converted. In case of a pure tort or injury to the person or property, it would be different. There can be no injury to the defendant. Nothing but the value of the goods taken can be recovered from him in this form of action, and certainly nothing less would be the measure of damages if the suit were upon the tort. Certainly, then, there is no ground of complaint, on the part of the defendant, that the wrong is waived and the suit is (457) upon the implied contract to pay the value of the thing converted instead of the tort."

This right to waive the tort in such cases was held to exist at common law. The effect of this decision was to make inapplicable that provision of the Act of 1715 barring trover for conversion in three years; and it would make inapplicable that part of the present three-year statute which bars "actions for the detention or conversion of personal property."

Another case cited is Kirkman vs. Phillips' heirs, 7 Heis., 222, decided in 1872. This case followed the Alsbrooke and other cases before the Code, in holding "where property has been converted, the owner may sue for the property itself, or damages for its conversion; or he may waive the tort and sue for the value of the property as a debt." If he elected the latter remedy by waiving the tort the nature of his action would be in debt. As to the statute of limitations it was said: "If the original owner of the property elect to sue for the property, or for damages for the conversion, the action will be barred by the statute of three years: Code, Sec. 2773. But if the party elects to sue for the value of the property, the action will be barred in six years: Code, Sec. 2775."

In McCombs vs. Guild, Church & Co., 9 Lea, 81, 87, it was said:

"The action is not in trover, but in contract waiving the tort. It is well settled that a conversion of property will warrant an implication of indebtedness, and that the tort may be waived, and an action *ex contractu* maintained for its value." This opinion by Judge Cooper reviews the cases before and since the Code, and states: "'The conclusion reached in those cases seems to be the logical result of allowing the injured party to elect to sue upon the implied contract." If the plaintiff exercised his legal option to sue on the implied contract the limitation applicable to his action was, according to these cases, six years; but if he did not waive, but sued on account of the tort, his action was barred in three years.

The other cases cited to this point by the Court of Appeals are Ramsey vs. Temple, 3 Lea, 253; Bruce vs. Baxter, 7 Lea, 4477, and Wallace vs. Lincoln's Savings Bank, 89 Tenn., 631.

The first was a suit against an attorney for wrongfully ordering the return of an execution when the debtor was solvent. More than six years had elapsed, and the Court said: "The wrongs complained of occurred more than six years before the bill was filed, and this being the longest time, the action was barred, unless there be some ground of exception."

Bruce vs. Baxter was a suit against an attorney for "negligence in not collecting certain claims specified," which had been placed in his hands for collection. It was held that the suit was not one for injury to property and therefore not within the three-year statute. As to the statute applicable, the Court said: "The section applicable is 2775, last clause: 'Actions on contracts not otherwise provided for, within six years after the cause of action accrued.' The recovery is claimed on the ground of breach of contract to collect, which involved an obligation to use reasonable diligence in doing what was undertaken, under all the circumstances of the case; and a failure to use such diligence, resulting in a loss to complainant, would make the attorney liable to the extent of such loss, no further: Wait's Act. and Def., Vol. 1, 445; Secs. 1 and 2, 459, 60. Since the liability grows out of breach of contract, it is within the terms of the above section—not being provided for by any other."

Wallace vs. Lincoln's Savings Bank was a suit by share-holders against directors of a bank for negligence, inattention and mismanagement of the bank's affairs. The Court affirmed the principles stated in the last case, and held that for the same reason

the six-year limitation, and not that of three years, applied. "The relation of a director to a corporation," said the Court, "implies a contract that he will use ordinary diligence in the discharge of the duties he undertakes by accepting the office." Chitty says it was usual to declare in assumpsit against attorneys and other agents for neglect or other breach of duty; and the holding of the Court in the cases last cited was only a declaration of the common law rule that such actions are *ex contractus* in their nature. The other cases, previously referred to, only declared the right to waive the tort and sue in contract for the value of the property wrongfully taken and converted—a class of cases that would confessedly be barred in three years by the second clause of Section 2773 of the Code of 1858 if the tort was not waived. None of these cases hold that for an injury to property by trespass, whether immediate or consequential, or whether the property be tangible or intangible, an action *ex contractu* will lie. And there is no case in Tennessee holding that the tort may be waived except where personal property has been taken and converted. In such cases the wrong-doer is not injured, as the Court said in Alsbrooke vs. Hathaway, Supra, by the rule allowing the waiver of the tort; because he is only compelled to pay the value of what he took wrongfully, just as if he had acquired title by contract of purchase. But for a wrong or tort, injuring the person or property, damages to be assessed by a jury according to the character of the wrong and the right violated, is the only redress. It is the holding of all the cases cited that actions for torts are barred in three years, although this result may sometimes be escaped by waiving the tort. In recognition of this distinction between actions, such as suits against attorneys and other agents for breach of contract, and those for the *value* of property taken and converted, which are *ex contractu* in nature, and actions for injuries to persons or property by trespass or torts, it is held that jurisdiction of the latter was not conferred upon Courts of equity in Tennessee by the act clothing such Courts with jurisdiction of actions at law.

The true test as to the limitation applicable, is the character of the action described in the Act of Congress, authorizing suit by "any person who shall be injured in his business or property" for three-fold damages by him sustained. According to this description the suit must be one for *damages* occasioned by an act forbidden or declared unlawful by the statute; and the only damages re-

coverable are such as have been sustained by reason of injuries to business or property. The injury, it has been held, must be actual and the direct result of the unlawful Act; and every description of property would be included in the general terms "business or property," provided it was a means of carrying on, or was a subject of, interstate commerce. An interstate business, whether buying and selling, or furnishing the means of transportation, might be directly injured in many ways by the acts forbidden or declared unlawful. So might any property which was used in such business of transportation, or was the subject of interstate commerce. The Seventh Section of the Act authorizes the kind of suit exactly within the meaning, and almost within the exact terms of Section 2773 of the Code of Tennessee. If the one statute refers, as held by the Court of Appeals, only to direct injuries to tangible property, then so would the other; and the three-year limitation would apply even on this narrow construction. But we insist that reason requires a broader construction of both acts, and that whatever be the description of property injured by the acts forbidden by Congress, the suit for damages thereto would be barred by that section of the Tennessee Code describing the same character of injuries.

THE TEN-YEAR STATUTE.

Lastly, the Court of Appeals erred, as we insist, in holding that an action brought by the party aggrieved, under the Seventh Section of the Anti-trust Act, was not barred for ten years.

This conclusion logically resulted from the other holdings; first, that Section 1047 of the Revised Statutes did not apply, and that the State Statutes of limitations did; second, that the one-year statute of the State, barring civil suits for statute penalties did not apply; third, that the three-year statute for injuries to property, or the detention or conversion of personal property, was not applicable; and fourth, that there being no element of express or implied contract in the nature of the suit authorized, the six-year statute would not apply. The only other statute was that of ten years relating to suits against guardians, executors, administrators, sheriffs, clerks and other officers on their bonds, actions on judgments and actions not otherwise provided for.

It is said by the Court of Appeals that the Statute of 21 James 1, Ch. 16, which was in force in Tennessee until the adoption of the Code of 1858, barred "all actions of debt grounded upon any

lending or contract without a specialty." But that an action of debt which was grounded upon a specialty was not barred by that statute. It was evidently overlooked by the Court that this old distinction between the two classes of actions in debt disappeared, when the Code of 1858 repealed the English statute, abolished private seals and put all contracts upon the same footing. Since that time the laws of the State have recognized no such action as debt grounded on a specialty, and every action of debt is barred in six years.

An action may be in the form of debt where the statutory liability is certain, or may be made so from the face of the statute. This is so in Tennessee where the penalty sued for is imposed for a public offense, as already shown in cases cited; similar actions are maintained in the Federal Courts for penalties due to the United States. But while such actions are in form debt, they are criminal in their nature and within the statute of limitations of the two governments relating to criminal proceedings. And civil liabilities founded on statutes may be in the nature of debt, or contract, but an action to enforce such liability, whatever its form, would be barred by the statute applicable to contracts; and limitations applicable would always depend on the nature of the liability declared or imposed. This is illustrated by the case of Bagley vs. Shoffach, 43 Ark., 377, where it is said: "When forms of actions were observed it was common to declare in debt for a statutory penalty, but this was because the sum demanded was certain, and the action was in such cases merely in form *ex contractu*. Chaffee vs. U. S., 18 Wall., 516; Stockwell vs. U. S., 1b., 531. The exaction of excessive fees for legal services is a species of fraud, and the same remedies are applicable as in other cases of fraud."

Neither the case of Bullard vs. Bell, 1 Mason, 243, or any other cases, so far as we have found, holds that an action of debt is maintainable where damages are awarded for a wrong declared by statute.

But the rule is, as declared in Householder vs. City of Kansas, 83 Mo., 488, 495, that whenever a statute "creates a right, but is silent as to the remedy, the party entitled to the right 'may resort to any common law action which will afford him adequate and appropriate means of redress.' Topley vs. Forbes, 2 Allen, 24;

Addison on Torts, 49; Knowlton vs. Ackley, 8 Cush, 97; Stearns vs. A. & St. L. Ry. Co., 46 Mo., 114."

Pollard vs. Bailey, 20 Wall., 520, 527;

Hightower vs. Fitzpatrick's heirs, 42 Ala., 600.

In the cases that follow an action on the case was held to be the proper remedy.

Aldrich vs. Howard, 7 R. I., 199, 213, where the act prohibited was the building of a house contrary to specifications in fire limits declared by statute. The damage sued for by plaintiff was the increased danger from fire to an adjoining building, increase of insurance rates and decrease in rental value.

Sandford vs. Haskell, 50 Me., 86, where a statute allowed the recovery of double the price for building defendant's part of a partition fence.

Reed vs. Northfield, 13 Pickle (Mass.), 99, where the recovery authorized was double the damage caused by a defect in a highway.

Morrison vs. Bedell, 22 N. H., 238, and Russell vs. L. & N. Ry. Co., 93 Va., 325, in both of which cases the distinction was stated between suits on statutes, for penalties or forfeiture, where the remedy was by an action in debt, and suits for damages consequent on a prohibited act, where case is the property remedy.

A similar distinction is made in Mount vs. Hooter, 58 Ill., 246, construing a statute making the owner liable in damages for allowing sheep to run at large while affected with contagious disease. Case was held to be the proper remedy, and the action was within the statute of limitations applicable to actions on the case.

Boyn vs. Smith, 17 Wend., 88, for treble damages for using false weights.

But we contend that the decision of the Court of Appeals is opposed to principles which have long been settled by this Court.

In Beatly vs. Barnes, 8 Cr., 98, 108, the plaintiff brought an action of assumpsit as he was authorized to do by a statute of Maryland for the amount which the defendant had received from the sale of lands in the District of Columbia. It was contended that the statute of limitations of Maryland did not apply because the suit was one to enforce a statutory liability. But this Court said: "The action for money had and received is clearly embraced by the statute of limitations; and it is encumbent upon the plaintiffs to show that the present case forms an exception to its operation.

It is contended that the present suit, being a statute remedy, is not within the purview of the statute of limitations. But we know of no difference in this particular between common law and statute right. Each must be pursued according to the general rule of law, unless a different rule be prescribed by statute; and where the remedy is limited to a particular form of action, all the general incidents of that action must attach upon it. Upon any other construction, it would follow, that the case would be without any limitation at all, for it would be quite impossible, upon any acknowledged principles, when a right had assumed the shape of a claim *in personam,* to attach to it a limitation which exclusively applied to the reality. Now, the statute of limitations has been emphatically declared a statute of repose, and we should not feel at liberty to break in upon its general construction, by allowing an exception which has not acquired the complete sanction of authority."

In McCluny vs. Silliman, 3 Pet., 270, a register of a United States land office in Ohio was sued for wrongfully refusing to enter an application in the books of his office. It was claimed that such liabilities were not within the statute of 21 James 1, Ch. 16, or the statute of limitations of Ohio applicable to actions on the case. But it was held barred as an action on the case. The policy of the Court was thus stated: "Of late years, the courts, in England and in this country, have considered statutes of limitations more favorably than formerly. They rest upon sound policy, and tend to the peace and welfare of society. The courts do not now, unless compelled by the force of former decisions, give a strained construction, to evade the effect of those statutes. By requiring those who complain of injuries to seek redress by action at law, within a reasonable time, a salutary vigilance is imposed, and an end is put to litigation."

And actions for liabilities arising out of duties imposed or acts prohibited by statutes have been held to be within the limitation imposed on all similar actions.

Metropolitan Ry. Co. vs. District of Columbia, 132 U. S., 1, 13;
Carroll vs. Green, 92 U. S., 509;
Campbell vs. Haverhill, 155 U. S., 610.

The last case cited was an action at law for infringement of a patent right. The plaintiff contended that the State statute of

limitations did not apply in bar of remedies created by Acts of Congress. The principles announced by this Court in the determination of that question are applicable here. Among other things it was said: "The settled policy of Congress has been to permit rights created by its statutes to be enforced in the same manner and subject to the limitations prescribed by the laws of the several States." (p. 618.) And in another place it was said: "But why should the plaintiff in an action for the infringement of a patent be entitled to a privilege denied to plaintiffs in other actions of tort? * * * Why, too, should the fact that Congress has created the right, limit the defenses to which the defendant could otherwise be entitled?"

The further declaration of the Court as to the evils that would exist if there was a privileged class of plaintiffs, who could, without limit of time, demand redress for their wrongs, is also in point, because torts that may be sued on at any time within ten years would be equally grievous to the repose of society.

The liabilities created by the statutes authorizing the organization of national banks, or for the infringement of patent rights, or rights founded on other Acts of Congress, have never been treated as specialties, even though sometimes clearly in the nature of debt.

McDonald vs. Thompson, 184 U. S., 72;
Cockrill vs. Butler, 78 F. R., 680.

In the latter case, a suit against the directors of a national bank, it was said:

"As to the kind of action this is, Justice Miller and Judge Thayer, in the case of Stephens vs. Overstolz, 43 Fed., 465, 466, say:

" 'The statute (referring to the statute under which the action is brought) says, you shall not do that, and if you do you shall be liable to all persons injured by your wrongful act. The extent of the liability incurred is the amount of the damage you have inflicted upon others. The terms 'wrongful act,' 'liability incurred' and 'damages' would seem to leave no doubt that the foundation of this class of actions is a tort.'

"Mr. Chitty says:

" 'Actions on the case are founded on common law or upon acts of parliament, and lie generally to recover damages for torts not committed with force, actual or implied.' 1 Chit. Pl., 133.

"He further says that 'the injuries may be by nonfeasance, m
feasance, or malfeasance;' and that 'these respective torts are co
monly the performance or omission of some act contrary to
general obligation of the law or the particular rights or duties
the parties.' Id. Again Mr. Chitty says: 'Wherever the stat
prohibits an act, and provides for a recovery of damages caused
its violation, the remedy is an action on the case.' Id. 142.
Stephens says that an action on the case lies where a party s
for damages for any wrong to which trespass will not apply. Ste
Pl., Sec. 52. Judge Bliss says that trespass lies for a wrongful
committed with force, and where the injury is direct; that wh
the injury is not the direct result of force, but grows out of
wrongful act of defendant, the action is trespass on the case, o
called 'the case.' Bliss, Code Pl., Sec. 9, subd. 2. Then it wo
seem that the right of action of the receiver, as outlined by Jus
Miller in the case cited (Stephens vs. Overstolz), comes wit
the distinction of action on the case, even if there were no o
authorities upon the subject."

There is not only no such form of action under the laws
Tennessee as a debt grounded on a specialty, but if there was
would be barred as any other action of debt, because the limita
would apply to the cause and not the form of the action. A
as said by the Court of Appeals, the cause of action stated co
not be in the nature of debt; nor for the same reason could i
a debt grounded on specialty. The ten-year statute of limitat
has, therefore, no application.

Respectfully submitted,

FOSTER V. BROWN,
FRANK SPURLOCK,
Attorneys for Plaintiff in Erro

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 94.

CHATTANOOGA FOUNDRY AND PIPE WORKS ET AL., PLAINTIFFS IN ERROR,

vs.

CITY OF ATLANTA.

OPINIONS OF THE CIRCUIT COURT AND THE UNITED STATES CIRCUIT COURT OF APPEALS.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 23785

(19,867.)

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(19 807.)

(101 Fed. Rep., 900.)

CITY OF ATLANTA

v.

CHATTANOOGA FOUNDRY AND PIPE CO.

MANION ET AL.

v.

SAME.

(Circuit Court, E. D. Tennessee, S. D., May 5, 1900.)

Nos. 647, 599.

1. MONOPOLIES—ACTION FOR DAMAGES UNDER ANTI-TRUST ACT—LIMITATION.—An action under anti-trust act (act July 2, 1890; 26 Stat., 209) section 7, providing that "any person who shall be injured in his business or property by any other person or corporation by means of anything forbidden or declared to be unlawful by this act may sue therefor in any circuit court of the United States, * * * and shall recover threefold the damages by him sustained," is not an action for a penalty or forfeiture within Rev. Stat., section 1047, prescribing a limitation of five years for a "suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States," but one for the enforcement of a civil remedy for a private injury, compensatory in its purpose and effect, the recovery permitted in excess of damages actually sustained being in the nature of exemplary damages, which does not change the nature of the action, and such action is governed as to limitation by the statutes of the State in which it is brought.

2. SAME—TENNESSEE STATUTE.—An action brought under such section, in which the right of recovery is based on an alleged exorbitant charge made by defendant to plaintiffs for manufactured articles purchased, by reason of a combination or trust entered into by defendant with others for the purpose of monopolizing trade in violation of the act, is for an injury to personal property, and comes within Shannon's Code Tenn., (section 4470, which prescribes a limitation of three years for "actions for injuries to personal or real property," being, in effect, the same as an action on the case for the recovery of the money which plaintiffs were illegally compelled to pay in excess of the fair market value of the articles purchased.

On Demurrers to Pleas Interposing the Defense of the Statute of Limitations of Tennessee.

Pritchard & Sizer for Manion & Co.

C. P. Goree, L. A. Dean, Westmoreland Bros., and J. L. Faust for city of Atlanta, Ga.

Brown & Spurlock for Chattanooga Foundry and Pipe Co.

CLARK, *District Judge:*

These suits are brought to recover damages under section 7 of the so-called "anti-trust act" of Congress of July 2, 1890, which reads as follows:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

The first-named case is a suit on behalf of the city of Atlanta, Ga., a municipal corporation, and the second on behalf

of plaintiffs, who aver that they are contractors engaged in the business of furnishing and laying gas, water, and sewer pipes in the city of New Orleans, La. The defendant heretofore has been, and now is, engaged in the business of manufacturing and selling cast-iron pipe and fittings used for the purposes of public drainage and sewerage, and by gas and water companies in the business of operating gas and water plants. The declarations in the two cases vary slightly in the form of statement of the case. Both suits are actions on the case, and, in substance, proceed upon the ground that the defendant entered into an unlawful trust or combination with others for the purpose of monopolizing trade in violation of the anti-trust act. The trade combination or trust complained of here was involved in Addyston Pipe and Steel Co. *v.* U. S., 175 U. S., 211; 20 Sup. Ct., 96; Adv. S. U. S., 96; 44 L. Ed., —, and is there fully described. The plaintiffs in each case became purchasers of the manufactured product of the defendant in large quantities and at prices set out in the declarations. It is charged with sufficient detail that by reason of the unlawful combination and trust contract entered into the defendants were enabled to advance, and did advance, the price on their manufactured goods, and that the plaintiffs were, in consequence, compelled to pay an exorbitant and unfair price, which is called a "bonus" on the goods purchased. The estimated difference between the just and fair market price of the goods and the price actually paid is stated in figures, and the specific damages claimed are laid at this difference between the fair price of the goods and the trust price paid, the declarations concluding with an averment of the right to increase the actual damages sustained threefold, as authorized by the act. Besides other pleas, the defendant interposes as a defense the State statute of limitations of one and three years, as found in the Code of Tennessee (Shannon's Revisal), sections 4469, 4470, the former section prescribing a limitation to actions for statute

penalties, injuries to the person, and other civil wrongs not necessary to be noticed, and the latter prescribing a limitation period of three years for injuries to property, real and personal. To these pleas the plaintiffs demur upon the ground that section 1047 of the Revised Statutes applies to the actions, and that the State statute is inapplicable.

The case in respect of the issues thus presented turns in part on the distinction between a penalty, as such, imposed by statute for a breach of its provisions, by way of punishment for the act, and in the public interest, on the one hand, and a private remedy conferred on a person specially injured by the unlawful act, and by way of compensation for the injury sustained, on the other. If the action authorized by section 7 is a penalty in the sense indicated, it might be conceded for the moment, or for the purposes of the question now to be decided, that section 1047 of the Revised Statutes would be applicable, and under that view the demurrer would be well taken. On the other hand, if the suit is not in its nature and substance a penal action, but a civil remedy for a private injury, compensatory in its purpose and effect, the action is subject to the State statute of limitations applicable to cases of this class, if there be such a statute (Campbell *v.* City of Haverhill, 155 U. S., 610; 15 Sup. Ct., 217; 39 L. Ed., 240; Brady *v.* Daly, 175 U. S., 148; 20 Sup. Ct., 62; Adv. S. U. S., 62; 44 L. Ed. —). In the last case cited, Mr Justice Peckham, giving the opinion of the court, said:

"The court below was, as is stated in the opinion, somewhat influenced in its decision of this question by the belief that, if this were not a penal statute, there was no Federal statute of limitations applicable to it, and said that it could hardly be supposed that it was the intent of Congress to permit such a statutory rate of damages to run without Federal statutory limitation. If there were no such Federal statute, then the State statute would apply. Although not an action to recover a statutory penalty or forfeiture, still, in the absence of any federal statute of limitations, it would be limited by the limitation existing for the class of actions to which it belongs in

the State where the action was brought (Campbell *v.* City of Haverhill, 155 U. S., 610, 614; 15 Sup. Ct., 217; 39 L. Ed., 270)."

See also Cockrill *v.* Butler (C. C.), 78 Fed., 679.

Section 1047 of the Revised Statutes prescribes limitations as follows:

"No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued: *Provided*. That the person of the offender, or the property liable for such penalty or forfeiture, shall, within the same period, be found within the United States; so that the proper process therefor may be instituted and served against such person or property."

It is necessary, therefore, to determine the question whether the suits are essentially penal or civil actions in their object and result. This question whether the action authorized is intended as a punishment or as compensation obviously involves the distinction between a civil remedy and a penal action in its primary or international meaning, this being the sense which was under consideration in the leading case of Huntington *v.* Attrill, 146 U. S., 657; 13 Sup. Ct., 224; 36 L. Ed., 1123, in which Mr. Justice Gray, for the court, said:

"In the municipal law of England and America, the words 'penal' and 'penalty' have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the State for a crime or offense against its laws."

In the previous case of Wisconsin *v.* Pelican Ins. Co., 127 U. S., 265; 8 Sup. Ct., 1370; 32 L. Ed., 239, Mr. Justice Gray, for the court, had said:

"The rule that the courts of no country execute the penal laws of another applies not only to prosecution and sentences

for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties."

In Huntington *v.* Attrill (1893), App. Cas. 150, before the privy council of England, precisely the same question was in judgment as that involved and decided in Huntington *v.* Attrill, *supra,* the suit being between the same parties. Lord Watson, delivering the judgment of their lordships, quoted the above passage from Wisconsin *v.* Pelican Ins. Co., rendering in italics the word "but to all suits in favor of the State," and then went on to say:

"Their lordships do not hesitate to accept that exposition of the law which, in their opinion, discloses the proper test for ascertaining whether an action is penal within the meaning of the rule. A proceeding, in order to come within the scope of the rule, must be in the nature of a suit in favor of the state whose law has been infringed. All the provisions of municipal statutes for the regulation of trade and trading companies are presumably enacted in the interest and for the benefit of the community at large; and persons who violate these provisions are, in a certain sense, offenders against the State law, as well as against the individuals who may be injured by their conduct. But foreign tribunals do not regard these violations of statute law as offenses against the State unless their vindication rests with the State itself, or with the community which it represents. Penalties may be attached to them, but that circumstance will not bring them within the rule, except in cases where these penalties are recoverable at the instance of the State, or of an official duly authorized to prosecute on its behalf, or of a member of the public in the character of a common informer. An action by the latter is regarded as an *actio popularis* pursued, not in his individual interest, but in the interest of the whole community."

In Dicey, Confl. Laws, page 220, the general proposition is laid down (as rule 40) that the High Court of Justice in England cannot entertain an action for the recovery of

penalty due under the laws of a foreign country or an action on a foreign judgment for such penalty. Upon the authority of leading cases cited, the rule is then commented on as follows:

"What is a penal law? The application of rule 40 raises the difficult question, When is a law to be considered a penal law? Or, what is really the same inquiry under another form, When is an action to be considered a penal action? These inquiries are to be answered as follows: A 'penal law' is strictly and properly a law which imposes punishment for an offense against the state; and a 'penal action' is a proceeding for the recovery, in favor of the State, of a penalty due under a penal law. A law, on the other hand, is not a penal law merely because it imposes an extraordinary liability on a wrongdoer, in favor of the person wronged, which is not limited to the damage suffered by him; and an action for enforcing such liability by the recovery of the penalty due to the person wronged is not a penal action. The essential characteristic, in short, of a penal action is that it should be an action on behalf of the government or the community, and not an action for remedying a wrong done to an individual. A proceeding, then, in order to come within rule 40, must be in the nature of a suit in favor of the State whose law has been infringed."

This question of distinction between penal actions brought by a common informer or on behalf of the State to redress a public wrong and remedial actions brought by the party injured to redress a private wrong has been under consideration in many adjudged cases (13 Am. & Eng. Enc. Law (2d ed.), 52; 16 Enc. Pl. & Prac. 229, where the subject will be found fully treated, and the cases cited).

It is quite obvious that no sound reason could be suggested why Congress would have been concerned in prescribing a limitation to actions for penalties or forfeitures other than such as are prosecuted in favor of the United States for breaches of the public law, punishable by pecuni-

ary mulct, or otherwise, at the instance of the United States. In Campbell *v.* City of Haverhill the court said:

"Is it not more reasonable to presume that Congress, in authorizing an action for infringement, intended to subject such an action to the general laws of the State applicable to actions of a similar nature? In creating a new right and providing a court for the enforcement of such right, must we not presume that Congress intended that the remedy should be enforced in the manner common to like actions within the same jurisdiction?"

This language is equally applicable to the remedy provided by section 7 of the act in question.

In examining the question of what "suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States" is within the purpose and meaning of section 1047 it would seem that reference may, with propriety, be made to section 919 as possibly throwing light on the inquiry, in which it is provided that—

"All suits for the recovery of any duties, imposts, or taxes, or for the enforcement of any penalty or forfeiture provided by any act respecting imports or tonnage, or the registering and recording or enrolling and licensing of vessels, or the internal revenue, or direct taxes, and all suits arising under the postal laws, shall be brought in the name of the United States."

The action provided for in section 7 of the act could neither be brought in the name of the United States nor prosecuted as a popular *qui tam* action, the remedy being expressly restricted to the party "injured in his business or property." The phraseology of the proviso in section 1047 must be regarded as somewhat significant as to the character of the prosecution within the legislative purpose. In view of these and other provisions of the Revised Statutes and of the doctrine of more recent cases, it seems permissible to en-

tertain serious doubt whether section 1047 applies, or was intended to apply, to suits other than those prosecuted in behalf of the United States. But, be this as it may, I conclude that this is not a penal action, and the recovery sought is not a penalty within the sense here involved, which is substantially the same as the international sense.

In Brady *v.* Daly the case was considered with reference to jurisdiction, as well as the statute of limitations, and the case at bar, in principle, is undistinguishable from that case and is governed by it. Mr. Justice Peckham, giving the opinion of the court (page 154, 175 U. S.; page 64, 20 Sup. Ct.; page 64, Adv. S. U. S., and page —, 44 L. Ed.), said:

"The statutes, it will be perceived, all use the word 'damages' when referring to the wrongful production of a dramatic composition. No word of forfeiture or penalty is to be found in them on that subject. It is evident that in many cases it would be quite difficult to prove the exact amount of damages which the proprietor of a copyrighted dramatic composition suffered by reason of its unlawful production by another, and yet it is also evident that the statute seeks to provide a remedy for such a wrong, and to grant to the proprietor the right to recover the damages which he has sustained therefrom. The idea of the punishment of the wrongdoer is not so much suggested by the language used in the statute as is a desire to provide for the recovery by the proprietor of full compensation from the wrongdoer for the damages such proprietor has sustained from the wrongful act of the latter."

The reasoning thus adopted is forcibly applicable to the cases at bar.

In Pidcock *v.* Harrington (C. C.), 64 Fed., 821, the main question was whether the anti-trust act conferred on a private person a right to sue in equity to restrain the act forbidden by the statute. It was determined that an action at law for damages was the only remedy of a private person. In analyzing the statute Judge Coxe said:

"The first three sections are penal statutes. They give no civil remedy. Section 4 vests the right to institute pro-

ceedings in equity in the district attorneys of the United States, and, together with section 5, prescribes the procedure in such suits. Section 6 provides for the seizure and forfeiture to the United States of property illegally owned under the provisions of the act. So far, then, the act is a public act providing no private remedy. If it ended with section 6, there would probably be no pretense that it sanctioned a suit like the one at bar. What follows, however, in no way strengthens the complainant's position. The only section which gives a private remedy is the seventh, which is as follows:"

Then, setting out section 7 in the very language of the statute, the court proceeded to say:

"But for this section, no private person would have any standing in court, and, as the only right conferred by it is the right to sue for damages in a court of law, it follows that the point presented by the demurrer is well founded. The precise question was decided in favor of the views here expressed in Blindell *v.* Hagan (C. C.), 54 Fed., 40, affirmed in 56 Fed., 696; 6 C. C. A., 86."

See also 14 Enc. Pl. & Prac., 55.

It is insisted by plaintiffs' counsel that, in so far as the statute authorizes the recovery of damages above those actually sustained, the actions must be regarded as penal. As, undoubtedly, the chief object of this section of the statute is remedial and protective, the fact that damages above actual compensation are allowed would not change the real character of the action. In many civil actions for the redress of private wrongs exemplary or punitive damages may be allowed by the court or jury, but this does not make the action penal. As was said by the Supreme Court of the United States in Railway Co. *v.* Humes, 115 U. S., 512; 6 Sup. Ct., 110; 29 L. Ed., 463:

"The injury actually received is often so small that in many cases no effort would be made by the sufferer to obtain redress if the private interest were not supported by the imposition of punitive damages."

In suits for the infringement of patents, in the event a verdict is rendered for the plaintiff, the court is expressly authorized to enter judgment for any sum above the amount found by the verdict as actual damages, not exceeding three times the amount of the verdict, together with costs (Rev. St., sec. 4919); and under section 4921 a court of equity, when exercising jurisdiction, is empowered in like manner to increase the damages found, the statute providing:

"And the court shall have the same power to increase such damages, in its discretion, as is given to increase the damages found by verdicts in actions in the nature of actions of trespass upon the case."

Nevertheless, Campbell *v.* City of Haverhill was an action on the case for infringement of letters patent, in which it was adjudged that the statute of limitations of the several States applied to such actions, and the suggestion that the action was penal evidently did not occur to counsel or the court.

Another view affecting the proper interpretation of the statute should be mentioned in closing the discussion of this point in the case. Section 3 of the statute declares unlawful and prohibits every trade combination or trust contract, and inflicts punishment for a violation of the statute by enacting that—

"Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

It would be unusual to discover that a statute inflicted punishment for infringement of its provisions by fine and imprisonment, or either, and again in the form of pecuniary penalty for the same act. A sound rule of interpretation

would be that when a statute inflicts punishment by way of fine and imprisonment at the suit of the State for a public wrong affecting the whole community, and also confers a remedy on a party for private injuries resulting from breaches of the statute, the latter will not be regarded as a penalty unless the statute so declares. It was accordingly so decided by the supreme court of Ohio in Railway Co. *v.* Methven, 21 Ohio St., 586. A statute providing for a fine or penalty usually either fixes the amount or prescribes maximum and minimum limits within which the amount must be fixed by the court or jury as the punishment, and the amount bears no direct relation to damages sustained by private injury. The amount of damages which may be recovered in the remedial action afforded by section 7 of the act in question is determined by the injury sustained, and the actual compensation therefor increased to treble that amount. The damages actually claimed here in the first case are laid at the sum of $50,000, and in the second $20,000. The great disproportion between these sums and the maximum limit of the fine imposed by section 3 is a circumstance admitting of no rational explanation, if the damages recovered under section 7 must be regarded as a penalty inflicted as punishment, like the fine imposed under section 3. These and other characteristic points of difference between penal and remedial actions support the conclusion arrived at that these actions are remedial and compensatory only.

The question now remains whether the statute of limitations of the State relied on is applicable to these actions or actions of the class to which they belong. The statute (Shannon's Code, section 4466) expressly declares the legislative purpose and intent to prescribe a bar to "all civil actions other than those for causes embraced in the foregoing article," the limitation of real actions having been provided in the preceding article. Sections then follow prescribing a

period of limitation to various suits, such as actions for injuries to the person and statute penalties, among which is section 4470, which reads as follows:

"Actions for injuries to personal or real property; actions for the detention or conversion of personal property, within three years from the accruing of the cause of action."

The words "personal and real property" are by the Code itself (section 63) thus defined:

"The word 'property' includes both personal and real property; the words 'personal property' include money, goods, chattels, things in action, and evidences of debt; 'real estate,' 'real property,' 'lands,' include lands, tenements and hereditaments, and all rights thereto and interests therein, equitable as well as legal."

A definition of "personal property," as given by a critical writer and fully sustained by authority, is in these words:

"Personal property includes every kind of chose in action, using that term in its very widest sense. It includes, that is to say, every movable which cannot be touched, or intangible movable. Thus it includes 'debts,' in the strict sense of the term, and also everything (not an immovable) which can be made the object of a legal claim; as, for example, a person's share in a partnership property" (Dicey, Confl. Laws, p. 313).

See also Schouler, Pers. Prop. (3d ed.), 2–17.

It will be observed that by the very terms of the act of Congress the remedy of a suit to recover damages is only conferred on "any person who shall be injured in his business or property." The suits in these cases must, therefore, necessarily be construed as actions to recover damages for an injury to "business or property."

The plaintiff in the first-named case is engaged in no business whatever, and the plaintiffs in the second case are engaged in the business of taking contracts to furnish and place

in position pipes and fittings. They do not deal in or handle pipes and fittings as merchants or dealers would do. It will admit of question whether, in an action under the statute for an injury to business alone, it would not be necessary for a plaintiff to allege that he was engaged in interstate trade or commerce in order to come within the protection of the act (Dueber Watch-Case Mfg. Co. *v.* E. Howard Watch and Clock Co. (C. C.), 55 Fed., 851; Bishop *v.* Preservers' Co. (C. C.), 51 Fed., 272). In Lowry *v.* Association (C. C.), 98 Fed., 817, facts are disclosed which, in respect of both the character of business and method of injury to such business, bring the case within the anti-trust act. However, the injuries alleged in the declaration as grounds for recovery are not injuries to any business in which the plaintiffs were engaged. The suits are clearly for the recovery of the difference between the fair market value of the goods purchased and the unlawful prices arbitrarily fixed by the trust combination; or, as stated in another form, the suits are to recover back, as damages, the sums of money unlawfully demanded and paid, increased threefold by the express direction of the act. Now, money has been declared to be personal property, not only by State statute, but again and again by text-writers and in judicial statement. Confessedly, the declarations present no case of an injury to property at all unless it is personal property. I am unable to perceive that the actions are for injuries other than to personal property.

The contention, finally, is that section 4470 of Shannon's Code of Tennessee is applicable only when the injury is direct. Such an interpretation would disregard all progress and carry us back to the old action of trespass. Before the reformed code systems of pleading adopted in most of the States, the action on the case had, by wide application, become the remedy for every wrong or injury to personal property to which trespass would not apply. Trespass upon the case would lie for every civil wrong to chattels personal,

whether corporeal or incorporeal and whether the injury was direct and immediate or indirect and consequential (And. Steph. Pl., sec. 52; Bish. Noncont. Law, sec. 45; Cooley, Torts (2d ed.), 510; Poll. Torts (5th Eng. ed.), pp. 13, 22, 495. See also Carrol *v.* Green, 92 U. S., 509; 23 L. Ed., 738; Railway Co. *v.* Clark, 38 U. S. App., 573; 20 C. C. A., 447; 73 Fed., 76; 74 Fed., 362; Cockrill *v.* Butler (C. C.), 78 Fed., 679). No valid reason could be suggested for a construction of the statute which would restrict its application within such narrow limits in view of the wide and various applications of actions on the case. The words of the statute, "actions for injuries to personal or real property," are general and in nowise restricted by the specific mention of actions for detention or conversion. If, indeed, money unlawfully obtained as alleged in these declarations is not a direct injury, the civil wrong belongs to a class for the redress of which trespass on the case had been a long-used remedy at the time of the adoption of the Code. In 1 Add. Torts (6th ed.), sec. 27, it is said:

"If one man has obtained money from another through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass, such money is, in contravention of law, not the money of the wrongdoer, but of the injured person, whose title to it cannot be destroyed and annulled by the fraudulent and unjust dispossession."

The author, then, declaring that an action will lie to recover back money paid under such conditions, continues:

"Such an action also lies against all persons who extort money for doing what they are by law bound to do without payment or reward, or who receive, and have in their possession, and wrongfully detain, the money of another; 'for,' as it has been observed, 'no man will venture to take, if he knows he is liable to refund.'"

The doctrine is supported by reference to cases in which it was decided that money may be recovered back when wrong-

fully paid under different circumstances. Thus, excessive charges demanded by a carrier of goods for transportation and paid by the consignee in order to get possession would support an action to recover back the excess; so of money paid under the coercion of threatened litigation, or money unlawfully demanded and received by a revenue officer for the release of goods seized, or other like payments wrongfully demanded and taken. In 2 Greenl. Ev. (16th ed.), sec 224, the distinction between an action of trespass and an action on the case is stated clearly, and in the fewest words possible, thus:

"By the former, redress is sought for an injury accompanied with actual force; by the latter, it is sought for a wrong without force."

And in reference to the character of the injury which would support an action on the case, it is further observed:

"So, though the property was forcibly taken, the force may be waived, and trover, which is an action on the case, may be sustained, for the value of the goods" (*Id.*, sec. 226).

The extended use of the action of trespass on the case is well indicated by the following definition, which has been generally accepted as accurate:

"The writ of trespass upon the case lies where a party sues for damages for any wrong or cause of complaint to which covenant or trespass will not apply" (And. Steph. Pl., sec. 52).

See also upon this subject Cockrill *v.* Butler (C. C.), 78 Fed., 679, and authorities there cited.

The circumstance that an exorbitant price for a commodity arbitrarily fixed by a trust combination is demanded and received through the medium of a contract of purchase in nowise affects or changes the real nature of the injury as an unlawful taking and detention.

"The commission of an act specifically forbidden by law, or the omission or failure to perform any duty specifically imposed by law, is generally equivalent to an act done with intent to cause wrongful injury. Where the harm that ensues from the unlawful act or omission is the very kind of harm which it was the aim of the law to prevent (and this is the commonest case), the justice and necessity of this rule are manifest without further comment" (Poll. Torts (5th ed.), p. 23).

In Conk *v.* Railroad Co., 1 Tenn. Cas., 409, possession of the goods was obtained through a contract for transportation, and the action was for the value of the goods. "The action," said the supreme court, "is for the detention or conversion of the plaintiff's property. It is true, the contract for carrying the goods is averred, and that the defendant failed to comply with it. Yet the gist of the action is the detention or conversion of the property, by which it was lost to the plaintiff." It was held that three years was the limitation.

In the light of this exposition of the law in respect of the form and proper application of the older and well-defined remedies, the inquiry into the legislative purpose disclosed in the section of the code with which I am dealing ought not to involve a question of interpretation which will not admit of satisfactory answer. The code of 1858 is a systematic compilation enacted as such, every part of which must be read in view of this circumstance and not as an independent enactment. Forms of actions were abolished by the code, and the statute of limitation does not depend on the form, but on the cause, of action (Conk *v.* Railroad Co., 1 Tenn. Cas., 409). In construing the words "actions for injuries to personal or real property," as found in section 4470, it seems allowable to refer to sections 4437 and 4438 in the preceding chapter, under the same title, both chapters belonging to part 3 of Shannon's Code, which treats "Of the Redress of Civil Injuries." In the sections last referred to the code undertakes to deal with all actions in the well-recognized classes

of actions *ex contractu* and *ex delicto*, and to completely abolish forms of action. Section 4437 declares that "all contracts may be sued on in the same form of action," and section 4438, dealing with the general subject of torts, provides that "all wrongs and injuries to the property, in which money only is demanded as damages, may be redressed by an action on the facts of the case." No valid reason could be offered to support an interpretation which would give to the words "actions for injuries to personal or real property" in section 4470, a meaning more restricted than the sense in which the words "all wrongs and injuries to the property" are used in section 4438. It is hardly to be doubted on any substantial ground that the legislative purpose in both sections was to include and provide for every species of injury to personal property included in the more general or collective name of torts or civil wrongs. The new remedy provided by Congress must be enforced just as like actions within the same jurisdiction (Campbell *v.* City of Haverhill; Cockrill *v.* Butler) in accord with Rev. Stat., section 914. The actions are therefore prosecuted according to Shannon's Code Tenn., section 4438, as actions "on the facts of the case;" and, agreeably to Rev. Stat., section 721, as expounded in the cases last cited (also Brady *v.* Daly), the State statute of limitations furnishes the rule of decision.

Having regard to the real nature and purpose of the actions, I conclude that they are suits for an injury to personal property and within section 4470 of the State statute of limitations prescribing a period of three years as a bar to such suits. It follows, of course, that section 4469 is inapplicable. Accordingly, the demurrer as to the second plea is sustained, and as to the third plea overruled.

(127 Fed. Rep., 23.)

CITY OF ATLANTA

v.

CHATTANOOGA FOUNDRY AND PIPEWORKS ET AL.

(Circuit Court of Appeals, Sixth Circuit, December 8, 1903.)

No. 1178.

1. MONOPOLIES—ANTI-TRUST ACT—ACTION BY CITY FOR INJURY TO BUSINESS.—A municipal corporation engaged in operating water, lighting, or similar plants from which a revenue is derived is, in relation to such matters, a business corporation, and may maintain an action under section 7 of the anti-trust act of July 2, 1890 (c. 647, 26 Stat., 210, U. S. Comp. Stat. 1901, p. 3202), for injury to its "business" by reason of a combination or conspiracy in restraint of interstate trade or commerce made unlawful by such act.

2. SAME—LIABILITY OF MEMBERS OF COMBINATION.—Every member of an illegal combination in restraint of interstate trade or commerce in violation of the anti-trust act is liable for the damages resulting to the business or property of a plaintiff by reason of such combination, and it is immaterial that there were no direct contract relations between plaintiff and defendant.

3. SAME—INJURY TO BUSINESS.—If the effect of an illegal combination between manufacturers to prevent competition in the sale of a commodity which is a subject of interstate commerce be to enhance the price of such commodity to a purchaser, he is entitled to recover the difference between the price paid and the

reasonable price under natural competitive conditions as an injury to his business, whether such business is interstate or not, provided the transaction by which the purchase was made was interstate.

4. Same—Action for Damages—Limitation.—An action under section 7 of the anti-trust law (act July 2, 1890, c. 647, 26 Stat., 210, U. S. Comp. Stat., 1901, p. 3202), providing that "any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any circuit court of the United States * * * and shall recover threefold the damages by him sustained," is not an action for a penalty or forfeiture within Rev. Stat., section 1047 (U. S. Comp. Stat. 1901, p. 727), prescribing a limitation of five years for a "suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States," but one for the enforcement of a civil remedy given by statute for a private injury, compensatory in its nature and effect, the recovery permitted in excess of actual damages being in the nature of exemplary damages, which does not change the nature of the action, and such action is governed as to limitation by the statutes of the State in which it is brought.

5. Same—Tennessee Statute.—An action under said section based on an alleged excessive price plaintiff was compelled to pay for a manufactured article by reason of a combination between defendants and others to prevent competition and enhance the price of such article in violaiton of the act is not one for an injury to personal property within Shannon's Code Tenn., section 4470, which prescribes a limitation of three years for "actions for injuries to personal or real prop-

erty," but which is one to enforce a statute liability, and within section 4473, which prescribes a limitation of ten years for certain actions and in "all other cases not expressly provided for."

In Error to the Circuit Court of the United States for the Eastern District of Tennessee.

See 101 Fed., 900.

This was an action to recover damages under the seventh section of the act of Congress of July 2, 1890 (c. 647, 26 Stat., 210, U. S. Comp. Stat. 1901, p. 3202), known as the "anti-trust act." The plaintiff is a municipal corporation of the State of Georgia. The defendants are two manufacturing corporations of the State of Tennessee engaged in the business of making and selling cast-iron pipe and fittings.

The declaration averred that on or about the 28th of December, 1894, the said two companies entered into an unlawful combination for the purpose of restraining interstate trade and commerce with four other corporations engaged in the same line of manufacture, to wit, the Anniston Pipe and Foundry Company and the Howard-Harrison Iron Company, both corporations of the State of Alabama and conducting business in that State; the Dennis, Long & Co., a corporation of the State of Kentucky and carrying on its business in said State, and the Addyston Pipe and Steel Company, a corporation of the State of Ohio engaged in business at Cincinnati, in that State. The illegal trust agreement complained of is the identical trust which was dissolved by decree of this court in the case reported as The United States *v.* The Addyston Pipe and Steel Co., 85 Fed., 271; 29 C. C. A., 141; 46 L. R. A., 122, and affirmed by the Supreme Court in Addyson Pipe and Steel Co. *v.* United States, 175 U. S., 211; 20 Sup. Ct., 96; 44 L. Ed., 136. Reference may be made to the opinions in those cases for the nature and methods of the trust out of which has arisen the present action.

The declaration, in substance, charges that the plaintiff was engaged in conducting a system of waterworks, and that it derived a large revenue from the sale of water to private consumers, the income going into the city treasury; that, for the purposes and uses of its said waterworks business, it bought during the operation of said unlawful trust a large supply of iron water pipe, and that the contract for its supply of such pipe was given to the Anniston Pipe and Foundry Company as the lowest bidder. It is then averred that, by reason of the said unlawful agreement between the said producers of said pipe, all competition was suppressed, and that the said Anniston Company obtained the contract through an arrangement by which it was to be allowed to obtain same at a price agreed upon between said conspirators without any competition, and that for this privilege it agreed to pay and did pay to the said association a large sum, called a "bonus," which was to be divided between the parties to said arrangement in agreed proportions. It is, in effect, charged that the "bonus" constituted the difference between the fair and reasonable value of the pipe so bought by the plaintiff and the price which it was compelled to pay, and that this large and unreasonable price was extorted from plaintiff through the unlawful suppression of competition, and by the instrumentality of fictitious bids put in by the other parties to said association, so arranged as to create the semblance of competition, and yet secure the contract for the Anniston Company at the price set by the combination as the ostensible lowest bidder. The plaintiff avers that, by reason of the formation of said illegal combination, interstate commerce in cast iron was restrained and plaintiff compelled to deal only with the said Anniston Company and to pay a price agreed upon by the members of the combination, which was unreasonable; that the bonus so paid out of the price paid by plaintiff was paid into a common pocket and divided among the conspirators in an agreed way, and that the two Tennessee corporations here sued received their due propor-

tion of said bonus according to the terms and plans of the scheme, by all of which the plaintiff avers that it was compelled to pay for the cast-iron pipe so bought and used in its said waterworks $15,000 more than would have been paid but for the said unlawful trust between the producers of such pipe, and it lays the damage to its business and property at triple the said excess price so paid and reasonable attorneys' fees.

The defendants plead the general issue of not guilty and the Tennessee statutes of limitations of one and three years.

Upon the conclusion of all the evidence the court instructed the jury to find for the defendants. This has been assigned as error and this writ sued out by the plaintiff below.

George Westmoreland and C. P. Goree for plaintiff in error.

Frank Spurlock for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, *Circuit Judge*, after making the foregoing statement of the case, delivered the opinion of the court:

The plaintiff's action is to recover damages incurred in its "business or property" by reason of a combination forbidden by the act of July 2, 1890 (c. 647, 26 Stat., 209, U. S. Comp. Stat. 1901, p. 3200), known as the "anti-trust act," and its right to a recovery depends wholly upon the seventh section of that law.

It is true that plaintiff is a municipal corporation. Nevertheless, it was maintaining a system of waterworks and furnished water to consumers, charging for same precisely as would a private corporation engaged in a like business. That a municipal corporation may be empowered to engage in the business of furnishing water or gas or in the operation of street railways, as well as many other quasi-public occupations, must be conceded. That the profit resulting inures to

the public does not alter the fact that when thus engaged it is *pro hac vice* a business corporation. If its "business" as a corporation engaged in the occupation of supplying water for a consideration has been injured by the unlawful combination complained of, it is just as much entitled to maintain this suit as a private corporation engaged in a like occupation. That it was not engaged in an interstate water business is true. But if it has no standing to recover damages for an injury to its "business" it is not easy to see how it has any better standing to recover for an injury to its "property." That there was evidence tending to show that the plaintiff had been compelled to pay an unreasonable price for the pipe which it bought during the continuance of the unlawful combination complained of is not to be disputed. That its purchases were made exclusively from the Anniston Pipe Company, a corporation doing business in Alabama, and that it is not suing that corporation is of no vital significance. The Alabama company and the two Tennessee companies which are sued were members of an association which included practically every pipe manufacturing concern in a situation to compete for the business of the plaintiff. The evidence also tended to show that the object of the combination was to prevent any other producer of such pipe from competing with the Anniston Company for plaintiff's business, and that practices were adopted intended to compel it to deal exclusively with the Alabama member of the association, and to pay a price settled by the combination in advance of any bidding. For this privilege the Alabama corporation agreed to pay a large sum into the pool treasury, called a "bonus," which was to be divided among the confederates in agreed proportions. An appearance of competition was to be maintained by bids put in by the other associates, every such bid being higher than the bid to be made by the company to whom the contract had been assigned. There was to be no chance for any other person to secure a

contract with the plaintiff than that member of the combine selected in advance of the open biddings.

Mr. Justice Peckham, in Addyston Pipe Co. *v.* United States, 175 U. S., 211, 243; 20 Sup. Ct., 96, 108; 44 L. Ed., 136, where this very combination was under consideration, speaking for the court of the results of the agreement between the corporations who were members of this trust, said:

"The combination thus had a direct, immediate and intended relation to, and effect upon, the subsequent contract to sell and deliver the pipe. It was to obtain that particular and specific result that the combination was formed, and but for the restriction the resulting high prices for the pipe would not have been obtained. It is useless for the defendants to say that they did not intend to regulate or affect interstate commerce. They intended to make the very combination and agreement which they in fact did make, and they must be held to have intended (if in such case intention is of the least importance) the necessary and direct result of their agreement."

Undoubtedly it was not competent for the Congress to regulate by legislation commerce which is purely intrastate, and this limitation was recognized in Addyston Pipe Co. *v.* United States, where the court said:

"In regard to such of these defendants as might reside and carry on business in the same State where the pipe provided for in any particular contract was to be delivered, the sale, transportation, and delivery of the pipe by them under that contract would be a transaction wholly within the State, and the statute would not be applicable to them in that case. They might make any combination they chose with reference to the proposed contract, although it should happen that some non-resident of the State eventually obtained it."

The direct intention and effect of the combination was to limit and restrict the right of each of the several companies to compete for business with Atlanta, as well as to enhance the price of the commodity which was the subject of the agreement.

We have, then, a direct action by this plaintiff against two of the members of this unlawful combine. That there was no purchase made direct from either of them is of no importance. Their guilt is as great as that of the Alabama corporation, from whom the plaintiff did buy its pipe. If the agreement between the defendants and their associates was unlawful and tortious, each is responsible for the torts committed in the course of the illegal combination. These defendants have themselves participated in the benefits resulting from the bonus paid by the Alabama member of the association, and have no ground to complain that they have been alone sued (Stockwell *v.* U. S., 13 Wall., 531; 20 L. Ed., 491; Van Horn *v.* Van Horn, 52 N. J. Law, 286; 20 Atl., 485; 10 L. R. A., 184; Robertson *v.* Parks, 76 Md., 118, 135; 24 Atl., 411).

Replying to the argument that if the combination did not prevent any particular contract that it had not restrained trade, Justice Peckham, in Addyston Pipe Co. *v.* United States, 175 U. S. 245; 20 Sup. Ct., 109; 44 L. Ed., 136, said:

"It is not material that the combination did not prevent the letting of any particular contract. Such was not its purpose. On the contrary, the more contracts to be let, the better for the combination. It was formed, not for the object of preventing the letting of contracts, but to restrain the parties to it from competing for contracts, and thereby to enhance the prices to be obtained for the pipe dealt in by those parties. * * * The question is as to the effect of such combination upon the trade in the article; and if that effect be to destroy competition, and thus advance the price, the combination is one in restraint of trade."

If, then, the price of a commodity which is the subject of an interstate contract be unlawfully enhanced by a combination for the purpose of suppressing competition, shall the vendee thus compelled to pay this unlawfully enhanced price be without remedy against the combination because he may happen not to be engaged in the conduct of an interstate business? If the effect of a combination to enhance the

price of a commodity which is the subject of interstate commerce be to restrain such commerce, within the meaning of the law of Congress, by reason of its tendency to affect the volume of such trade, then the effect upon the business of one who has paid the enhanced price, in an interstate transaction, must be to correspondingly affect the volume or profit of that business. The difference between what he was thus compelled to pay and the reasonable price of the commodity under natural competitive conditions would be an injury to that business directly resulting from such unlawful combination. The injury to his business, whether it be in its volume or profit, is the same whether that business be inter or intra state, whether he buy to extend his plant or to sell again in an interstate business. This excessive price is the expected and intended result of the unlawful combination to restrain interstate trade in that commodity. That such a plaintiff is entitled to recover the damages thus sustained in his business, whatever its character, would seem to be the plain purpose of the seventh section of the law of Congress, under the logic of the decision in Addyston Pipe Co. *v.* United States. It is possible to so construe this seventh section as to devitalize this section by confining compensatory relief to such persons as shall sustain an injury in some interstate business whose volume or profit has been diminished. But this construction does not seem consistent with the wide economic purposes of Congress, as manifested by the whole tenor of the act. Congress evidently foresaw the wholesome effect of pecuniary responsibilities for injuries resulting from such forbidden combinations, and the courts should not devitalize the remedy by strained interpretations calculated to encourage disregard of the law. The act gives the remedy to "any person injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act." If Congress had the power to declare unlawful a combination which was intended to restrain interstate commerce by enhancing the value of

a commodity when the subject of interstate commerce, it had the power to give a compensatory remedy to any person directly affected by the unlawful agreement.

We see no application of the case of Connolly *v.* Union Sewer Pipe Co., 184 U. S., 540;,22 Sup. Ct., 431; 46 L. Ed., 679, to the case at bar. Undoubtedly the contract of purchase and sale of pipe was a contract wholly collateral to the unlawful trust agreement between the makers of such pipe, and the vendor could make out a case for the purchase price without reliance upon the unlawful agreement between such makers. The contract of bargain and sale between the Anniston Pipe Company and the plaintiff was therefore a valid and enforceable agreement, and the plaintiff could not defend a suit for the price by showing that the seller was a partner in an illegal association. The court in that case did decide that the damages recoverable under the seventh section were recoverable only in a direct action, and could not be set off in a suit under a contract for the price. But this was based, not upon any construction of that section, but upon the general principle of law which forbids the setting off of unliquidated damages not directly growing out of the principal transaction. The present suit is a direct action, and is therefore unaffected by anything decided in that case.

This brings us to the question of the limitation applicable to the suit. Under the evidence, it was very plain that plaintiff's right of action accrued more than three and less than five years before action commenced. The anti-trust act provides no limitation, and, if any has been prescribed by Federal law, it is that found in section 1047, Rev. Stat. (U. S. Comp. St. 1901, p. 727), which provides that "no suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States" shall be maintained unless commenced within five years from accrual of penalty of forfeiture. If this is an action to recover a penalty within the meaning of this statute, the suit was in time. The shorter statute of the State, limiting the time for

the commencement of suits for statutory penalties to one year, would have no application to a suit for a penalty under an act of Congress. It is only when there is no Federal statute that the limitation prescribed by the law of the State is applicable (Campbell *v.* Haverhill, 155 U. S., 610, 614; 15 Sup. Ct., 217; 39 L. Ed., 280; Brady *v.* Daly, 175 U. S., 148; 20 Sup. Ct., 62; 44 L. Ed., 109).

We find ourselves in agreement with the court below in holding that an action under the seventh section of the act of July 2, 1890 (c 647, 26 Stat., 210, U. S. Comp. Stat. 1901, p. 3202), is not a penal action. The first three sections of the act are undoubtedly penal. They forbid certain contracts and combinations, and provide that persons doing any of the forbidden things shall be guilty of a misdemeanor and subject to punishment by both fine and imprisonment. The fourth and fifth sections give jurisdiction to the circuit courts to prevent and restrain violations of the act, and deal with procedure under the restraining power thus granted. The sixth section provides for the forfeiture to the United States of property in course of transportation owned by any such unlawful combinations, etc. The seventh section alone gives any remedy to any one injured by such a forbidden combination or contract, and that measures the relief by the "damages by him sustained," costs of suit, and his reasonable attorney's fees. The remedy is not given to the public, for no one may bring the action save the person "who shall be injured," etc., and the recovery is for the sole benefit of the person so injured and suing. It is not reasonable to construe the remedy so conferred as a penal action, for that would be to add to the punishment by fine or imprisonment imposed by the other sections of the act an additional punishment by way of pecuniary penalty. The plain intent is to compensate the person injured. True, the compensation is to be three times the damage sustained. But this enlargement of compensation is not enough to constitute the action a penal action within the meaning of section 1047 Rev. Stat. (U. S.

Comp. Stat. 1901, p. 727). Thus in Goodridge *v.* Rogers, 22 Pick., 495, and Adams *v.* Palmer, 6 Gray, 338, the action was for a tort for entering upon land and committing trespass, and was brought under a statute which gave to the plaintiff threefold damages. It was nevertheless held not to be an action for a statute penalty, so as to bring it under a statute which barred all actions and suits for penalties and forfeitures within one year. In suits for the infringement of patents judgment for threefold the actual damages may be rendered, but suits under the statute have never been regarded as penal actions (Campbell *v.* Haverhill, 155 U. S., 610; 15 Sup. Ct., 217; 39 L. Ed., 280). In Woodward *v.* Alston, 12 Heisk., 581, an action against a clerk for fees illegally collected was held not to be a penal action, although called a "penalty" in the statute giving the particular remedy. In Brady *v.* Daly, 175 U. S., 148; 20 Sup. Ct., 62; 44 L. Ed., 109, the suit was under section 4966, Rev. Stat. (U. S. Comp. Stat. 1901, p. 3415), providing that one publicly presenting a copyrighted performance without the owner's consent shall be liable for all damages, "to be assessed at such sum, not less than one hundred and fifty dollars for the first, and fifty dollars for every subsequent performance as to the court may seem just." The suit was held not to be a suit for the recovery of a penalty or forfeiture.

The whole subject of penal and compensatory actions has been so thoroughly considered in Huntington *v.* Attrill, 146 U. S., 657; 13 Sup. Ct., 224; 36 L. Ed., 1123, and Brady *v.* Daly, 175 U. S., 148; 20 Sup. Ct., 62; 44 L. Ed., 109, as well as by the very full and able opinion of Judge Clark in the court below in disposing of a demurrer to a plea, that we feel we can add nothing to the subject.

The limitation applied by the court below was that prescribed by section 4470, Shannon's Revision Tenn. Code. Prior to the Tennessee Code of 1858 the statute of limitation operated upon the remedy and applied to the form of action. By the code then adopted, and its amendments, the limita

tion now applies to the cause of action (Kirkman *v.* Philips' Heirs, 7 Heisk., 222; Callaway *v.* McMillian, 11 Heisk., 557). The limitations of actions other than real are found in sections 4466 to 4483, inclusive, Shannon's Code. Section 4466 provides that:

"All civil actions, other than those for causes embraced in the foregoing article, shall be commenced after the cause of action has accrued, within the periods prescribed in this chapter, unless otherwise expressly provided."

Section 4469, among other things, prescribes that actions for "statute penalties" shall be brought within one year.

Sections 4470, 4472, and 4473 must come under consideration, and are here below set out in full:

"SEC. 4470. Actions for injuries to personal or real property; actions for the detention or conversion of personal property within three years from the accruing of the cause of action."

"SEC. 4472. Actions for the use and occupation of land and for rent; actions against the sureties of guardians, executors and administrators, sheriffs, clerks and other public officers for nonfeasance, misfeasance and malfeasance in office; actions on contracts not otherwise expressly provided for, within six years after the cause of action accrued.

"SEC. 4473. Actions against guardians, executors, administrators, sheriffs, clerks, and other public officers on their bonds, actions on judgments, and decrees of courts of record of this or any other State or government, and all other cases not expressly provided for, within ten years after the cause of action accrued."

The learned trial judge held this action to be one for an injury to property within the meaning of section 4470, and therefore barred in three years. To this we cannot assent. That section plainly applies only to causes of action arising out of some injury to property as distinguished from its detention or conversion. Property, either personal or real, may be injured or damaged without its being either detained or converted. But whether the cause of action be an injury or

damage to the property or for its taking or detention the suit must be brought within the same period. This distinction between the two kinds of injury to tangible personal property is of very ancient origin. Sir William Blackstone (volume 3, 145, 153), in his chapter entitled "Of Injuries to Personal Property," says:

"The rights of personal property in possession are liable to two species of injuries—the amotion or deprivation of that possession, and the abuse or damage of the chattels, while the possession continues in the legal owner. The former, or deprivation of possession, is also divisible into two branches—the unjust and unlawful taking them away, and the unjust detaining them, though the original taking might be lawful."

Touching injuries to property, as distinguished from its taking or detention, the same author says:

"As to the damage that may be offered to things personal, while in the possession of the owner, as hunting a man's deer, shooting his dogs, poisoning his cattle, or in any wise taking from the value of any of his chattels, or making them in a worse condition than before, these are injuries too obvious to need explanation. I have only, therefore, to mention the remedies given by the law to redress them, which are in two shapes: By action of trespass *vi et armis*, where the act is in itself immediately injurious to another's property, and therefore necessarily accompanied with some degree of force; and by special action on the case, where the act is in itself indifferent, and the injury only consequential, and therefore arising without any breach of the peace. In both of which suits the plaintiff shall recover damages in proportion to the injury which he proves that his property has sustained. And it is not material whether the damage be done by the defendant himself or his servants by his direction, for the action will lie against the master as well as the servant. And if a man keeps a dog or other brute animal used to do mischief, as by worrying sheep or the like, the owner must answer for the consequences, if he knows of such evil habit."

We find in the very carefully selected verbiage of section 4470 a recognition of the two kinds of injury to which tangi-

ble property is susceptible—one by a damage which does not affect the possession, and the other by a taking or detention which does.

While the precise question has not been decided by the supreme court of Tennessee, we do find an indisposition to give to the section any such broad and indeterminate meaning as would include a suit which does not involve any actual injury to property. Thus this section was held not to apply to a suit against an attorney for the negligent loss of a debt intrusted to him for collection (Bruce *v.* Baxter, 7 Lea, 477; Ramsey *v.* Temple, 3 Lea, 253), nor to the suit of a stockholder, in behalf of the corporation, against bank directors for the negligent discharge of their duties, by which the corporation had sustained losses (Wallace *v.* Lincoln Savings Bank, 89 Tenn., 631; 15 S. W., 448; 24 Am. St. Rep., 625).

In Kirkman *v.* Phillips' Heirs, 7 Heisk., 222, 225, the court said:

"The statute of limitations applicable depends upon the nature and character of the action, and not upon its form."

In the same case it was held that, although the forms of action have been abolished by the code, an owner of personal property whose right to sue for damages for its conversion was barred by the statute of three years might waive the tort and sue for the value upon the implied assumpsit, in which case his suit would not be barred in six years, that being the time within which a suit upon a contract might be brought. (See also Alsbrook *v.* Hathaway, 3 Sneed, 454.) Actions on statute liabilities, not being a statute penalty and not dependent upon any contract, express or implied, are actions not otherwise "expressly provided for by any of the other sections of the chapter upon the limitations of actions other than real." Such an action is at the common law—one in the nature of an action upon a specialty—and is of a similar kind to those enumerated in section 4475, Shannon's Code. Under the statute of 21 James I, c. 16, all actions "upon the

case," with certain exceptions, and "all actions of debt grounded upon lending or contract without specialty" were barred unless commenced within the time named in the statute. But an action of debt which was grounded upon a specialty was not within the statute. Specialties were not within the evil intended (Angell on Limitations, sec. 80; Jones *v.* Pope, I Saunders, 38; White *v.* Parkin, 12 East, 578; Browne on Actions at Law, 345; Bullard *v.* Bell, I Mason, 243; Fed. Cas. No. 2121; 4 Bacon, Abridgment, 471). But the statute of James operated upon the form of action. Thus all actions "upon the case," whatever the cause of action, were within the bar of the statute, and so were "all actions of debt grounded upon any lending or contract without specialty."

In Carroll *v.* Green, 92 U. S., 509; 23 L. Ed., 738, it was held that a suit by creditors of a corporation to enforce their claims against stockholders under a clause of the charter rendering them individually liable was barred by the South Carolina statute, being, in substance, the act of 21 James I, c. 16. The reason given for this result was that the charter was a mere offer or proposal by the State, which the stockholders could accept or reject, and that by taking stock they assented to the liability imposed, and that the assent thus given and promise implied was the ground of liability, and that the action of case would lie upon such an implied promise, which action was within the bar of the statute. The court, however, went further, and held that the action or suit was not on the statute, and was therefore not an action on a specialty. "The statute," said the court, "was only inducement. The implied promise of the stockholders to fulfill its requirements was the agreement on their part, and it was without specialty." The distinctions made in the case are quite refined and turn upon common-law forms of action. So far as the case goes upon the ground that the charter involved a mere proposal, and that the liability of the share-

holder was grounded upon his implied agreement, it is in accord with the great current of authority.

The statute of James, as amended by act N. C. 1715, c. 21, was in force in Tennessee until adoption of the Tennessee Code of 1858 (act N. C. 1715, c. 31, Scott's Revisal, vol. I; Pea *v.* Waggoner, 5 Hayw., 19; Tisdale *v.* Munroe, 3 Yerg., 320). By the code the statutes no longer operate upon the form, but upon the cause, of action, and by section 4473 every cause of action not otherwise expressly provided for is barred without regard to whether it be upon a specialty or not.

It is impossible, having any regard to the verity of things, to conceive how any action would lie, under the seventh section of the anti-trust act, upon any implied agreement of the defendants to compensate the plaintiff for the injury to its business and property. But if we could torture an implied agreement out of the transaction, the defendants would not be in better plight, for, if the cause of action be a contract, express or implied, the action would not be barred for six years (Shannon's Code, sec. 4472). We are, however, of opinion that this is an action on a statute liability, and that the cause of action does not arise out of any agreement, and that such an action is not barred for ten years.

The third and fourth pleas were bad, and the demurrer to them should have been sustained. The direction to find a verdict for the defendants was also in error.

The judgment will be reversed, with directions to grant a new trial.